BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI and MISSOURI CENTRAL RAILROAD COMPANY,	
Complainants,	229326
v.	**Docket No. 42126**
UNION PACIFIC RAILROAD COMPANY,	
Defendant.	
MISSOURI CENTRAL RAILROAD COMPANY – ACQUISITION AND OPERATION EXEMPTION – LINES OF UNION PACIFIC RAILROAD COMPANY	**Finance Docket No. 33508** 229328
and	
GRC HOLDINGS CORPORATION – ACQUISITION EXEMPTION – LINES OF UNION PACIFIC RAILROAD COMPANY	**Finance Docket No. 33537** 229324

PETITION FOR WAIVER OF SERVICE OBLIGATION

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April 18, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI and MISSOURI CENTRAL RAILROAD COMPANY,	)	
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v.	)	**Docket No. 42126**
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and	)	
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PETITION FOR WAIVER OF SERVICE OBLIGATION

Pursuant to 49 C.F.R. § 1117.1, Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") and the Missouri Central Railroad Company ("MCRR") (collectively, "Ameren/MCRR") respectfully request that the Board waive the obligation for service of its filings in this proceeding on the entire service lists of Finance Docket Nos. 33508 and 33537. In support hereof, Ameren/MCRR state as follows:

The service list for Docket No. 33508 has 780 entries, while the list for Docket No. 33537 has 548 entries. These 12-year old lists are almost entirely composed of residents of

Lee's Summit, MO and other areas in and around Kansas City, MO. These residents' previously-stated objections have already been rejected by the Board and are not implicated in the lawfulness of the Labadie paper barrier. "The focus of the Cities' concern is the 24.8 mile 'west end,' between Pleasant Hill and Leeds Junction, over which MCRR would operate pursuant to trackage rights granted by UP." See STB decision served April 30, 1998.

In fact, the west end is approximately 200 miles from Labadie. In addition, a 5.6 mile section of the west end of the MCRR line was the subject of the recent abandonment and discontinuance of service proceeding. See Missouri Central Railroad Company – Abandonment and Discontinuance of Service Exemption – in Cass County, MO, Docket No. AB-1068X (STB served Dec. 27, 2010); Central Midland Railway Company – Discontinuance of Service and Operating Rights Exemption – in Cass County, MO, Docket No. AB-1070X (STB served Nov. 26, 2010). As part of that recent notice of abandonment and discontinuance of service in Docket No. AB-1068X, a public notice was published in a local newspaper in Cass County, MO (which includes the Kansas City Metropolitan area, including Lee's Summit), yet there were no filings by any party other than MCRR and the Missouri Department of Natural Resources (making a Trail Use Request). Thus, it appears that agency proceedings involving the MCRR line no longer attract the attention that the acquisition notice did in 1997.

Furthermore, due to large size of these service lists, the Board previously stated that service need not be made on the entire list. See F.D. 33508 and 33537, slip op. at 2 (n. 2) (STB served Jan. 27, 1998). Through inadvertence, Ameren/MCRR failed to serve its November 22, 2010 Complaint or its other recent filings on any portion of the service lists from these two dockets other than counsel for defendant UP. Service on the entire combined list from both dockets would serve little purpose other than consuming scarce litigation resources.

Given these factors, Ameren/MCRR respectfully request that the Board order that service for these two dockets be waived and that to the extent that service is deemed necessary by the Board, that Ameren/MCRR need only be made on the parties of record who are not residents of the Kansas City area. This group consists of:

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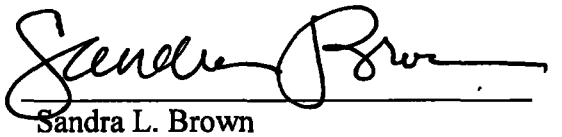
Ameren/MCRR will serve public versions of filings it has made in this proceeding, as determined by the Board, within three business days of the Board's decision clarifying this issue.

Ameren/MCRR respectfully request that the Board lift the service requirement for good cause as described above for the evaluation of the lawfulness of the Labadie paper barrier.

Respectfully submitted,



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April 18, 2011

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on April 18, 2011 on the parties listed below via e-mail and hand delivery.

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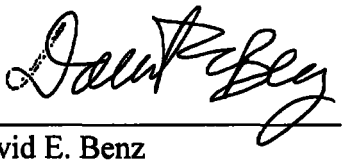

David E. Benz

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI and MISSOURI CENTRAL RAILROAD COMPANY,	
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v.	**Docket No. 42126**
UNION PACIFIC RAILROAD COMPANY,	
Defendant.	

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MISSOURI CENTRAL RAILROAD COMPANY – ACQUISITION AND OPERATION EXEMPTION – LINES OF UNION PACIFIC RAILROAD COMPANY	**Finance Docket No. 33508**
and	229327
GRC HOLDINGS CORPORATION – ACQUISITION EXEMPTION – LINES OF UNION PACIFIC RAILROAD COMPANY	**Finance Docket No. 33537**
	229323

OPENING EVIDENCE

Volume I of II

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April 18, 2011

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AMEREN MISSOURI'S AND MISSOURI CENTRAL RAILROAD COMPANY'S OPENING EVIDENCE[1]

Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") and the Missouri Central Railroad Company ("MCRR") (collectively "Ameren/MCRR") respectfully file this Opening Evidence pursuant to the procedural schedule adopted by the Surface Transportation Board ("Board" or "STB") on January 14, 2011. As demonstrated in this Opening Evidence, the paper barrier described herein is both an unlawful prohibition on MCRR's common carrier obligation to serve the Ameren Missouri Labadie facility and also an unlawful restriction on Ameren Missouri's right to receive such MCRR rail service. The Board should declare the paper barrier provisions void and unenforceable. Additionally and/or alternatively, the Board should revoke the exemptions in STB Finance Dockets 33508 and 33537 to the extent necessary to declare the paper barrier unenforceable. Furthermore, as shown below, the Labadie paper barrier is unreasonable under antitrust principles and should be declared unenforceable. In support hereof, Ameren/MCRR state as follows:

I. IDENTIFICATION OF PARTIES

Complainant Ameren Missouri is a subsidiary of the Ameren Corporation ("Ameren") that through its generating company affiliates provides electricity to approximately 2.4 million customers in Missouri and Illinois. Ameren Missouri owns and operates the coal-fired Labadie electric generating station in Franklin County, Missouri. As Missouri's largest utility, Ameren Missouri provides electricity to approximately 1.2 million customers in central and eastern Missouri. See Verified Statement of Jeffrey S. Jones ("V.S. Jones") at 1.

[1] Material in double brackets [[ ]] is Highly Confidential and material in single brackets [ ] is Confidential pursuant to the Protective Order entered in this proceeding on January 14, 2011. The Highly Confidential and the Confidential material is redacted from the Public Version.

Labadie is Ameren Missouri's largest power plant and burns in excess of 10 million tons of Powder River Basin ("PRB") coal annually. PRB coal (which comes from Wyoming) is the current source for Labadie's coal. The Labadie plant began operations in 1970, has a capacity of 2,405 megawatts, and has historically had access to more than one railroad. Having multiple fuel supply options and flexibility are extremely important to Ameren. V.S. Jones at 1.

As the Board is likely aware, Ameren Missouri and its affiliates have been active in trying to improve rail service and rates at their plants by creating competitive transportation alternatives. Ameren, via its partially-owned subsidiary, Electric Energy, Inc., completed its first rail build-out in 1990 using the Joppa and Eastern Railroad Company to the Joppa Plant in Illinois. See Verified Statement of Robert K. Neff at 1 ("V.S. Neff"). With the 2006 approval for the construction of the Coffeen and Western Railroad Company's build-out from Ameren's affiliate Ameren Energy Generating Company's Coffeen Power Plant, Ameren made an important move toward completing its objective of obtaining multiple transportation alternatives at all of its coal-fired plants, via various methods. Id. Ameren Missouri supports self-help measures and shipper investments in the rail transportation infrastructure to assist in fostering alternative opportunities for fuel and transportation. However, as Ameren expressed recently in comments filed in STB Ex Parte No. 705, Competition in the Railroad Industry, since 2004, the competitive environment among the western railroads has evaporated and the incentive for shipper self-help has been stifled. Comments of Ameren Corporation in Ex Parte No. 705, Competition in the Railroad Industry (filed on April 13, 2011). The creation of paper barriers in general and specifically the continued enforcement of the Labadie paper barrier harm rail competition. V.S. Neff at 2. Ameren Missouri is considering installing scrubbers at Labadie which would allow the plant to burn Illinois Basin coal. The planning for and installation of

scrubbers and other infrastructure needed to maximize fuel options and comply with environmental regulations facing utilities is a daunting and expensive endeavor which requires long lead times. The exact timing of the installation of this equipment is unknown due to uncertainty created by the court vacating the Clean Air Interstate Rules ("CAIR") in 2008, but installation is expected within the next ten years. Even if scrubbers are installed, Labadie may continue to burn PRB coal. The option to switch fully to Illinois Basin coal, continue using PRB coal, obtain coal from another source, or use any combination of these three sources is vital to Ameren Missouri. Ameren Missouri should have the ability and option to use the MCRR line for its coal (regardless of coal origin) and other transportation needs. V.S. Jones at 2.

The paper barrier restriction limits Ameren Missouri's ability to obtain truly competitive bids for coal sourcing and flexibility. This makes planning for and decisions necessary to address scrubbers and environmental-related issues considerably more difficult for Ameren Missouri. Removal of the paper barrier and restoration of the rights that SP had to interchange coal traffic in St. Louis would return Labadie to the status quo and ensure that Labadie's unrestricted and unimpeded fuel options are restored. V.S. Jones at 2.

Complainant MCRR is a Class III railroad common carrier which owns the former Rock Island line across Missouri between milepost 19.0 at Vigus, Missouri in the east to milepost 263.5 at Pleasant Hill, Missouri in the west. See Maps at Ex. 1 and 2.[2] MCRR is wholly owned by Ameren Development Company, a subsidiary of Ameren. MCRR would like to, and has the common carrier obligation to, provide rail transportation to the Labadie facility, a shipper destination site located directly on MCRR's tracks. See V.S. Neff at 3.

[2] The maps show the railroad connections to Labadie pre-sale to MCRR and today.

MCRR purchased its rail line from defendant Union Pacific Railroad Company ("UP") by way of GRC Holdings Corporation ("GRC") in a transaction that closed in 1999. See generally Missouri Central R.R. – Acquisition and Operation Exemption – Lines of Union Pac. R.R., F.D. 33508, and GRC Holdings Corp. – Acquisition Exemption – Union Pac. R.R., F.D. 33537, slip op. at 1 (STB served Sept. 14, 1999) (hereinafter "Acquisition Decision in Dockets 33508 and 33537"). In the same transaction, MCRR also acquired trackage rights from UP between Vigus and Rock Island Junction, Missouri (milepost 10.3), and between Pleasant Hill and Leeds Junction, Missouri (milepost 288.3) pursuant to a [[ ]] agreement. Id., V.S. Neff at 3-4.[3]

II. JURISDICTION OF THE STB

The Board has jurisdiction in this matter based on several provisions of its statute and precedent. The Board has broad jurisdiction over railroad operations in the U.S. pursuant to 49 U.S.C. § 10501 and other statutory authority. In addition, pursuant to 49 U.S.C. § 11701, complaints about violations of federal railroad statutes are properly filed at the Board. As part of its jurisdiction, the Board has authority to review paper barriers.[4] Review of Rail Access and Competition Issues, Ex Parte No. 575, slip op. at 2-4 (STB served Oct. 30, 2007) ("Review of

[3] MCRR and Central Midland Railway Company recently filed to abandon and discontinue service on 5.6 miles of MCRR (approximately 25 miles from the connection to the Kansas City Terminal Railway) between mileposts 257.283 (near Wingate) and 262.906 (near Pleasant Hill). See Missouri Central R.R. –Abandonment and Discontinuance Exemption – in Cass County, Missouri, AB-1068X, and Central Midland Ry. –Discontinuance of Service and Operating Rights Exemption – in Cass County, Missouri, AB-1070X. In light of this development, Ameren Missouri and MCRR are not specifically seeking relief on the Kansas City side at this time; however, the legal basis is the same. V.S. Neff at 8.

[4] The Board has favored use of the term "interchange commitment" in its discussions of paper barriers, but Ameren Missouri and MCRR assert that the phrase "paper barrier" more accurately describes the situation at Labadie due to the scope of the restriction, barring a railroad line that has actually served Labadie in the past from carrying coal to Labadie.

Rail Access III"). Likewise, the Board has authority to declare contractual terms, such as paper barriers, void if they conflict with common carrier operations. Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH and Darlington, PA, in Mahoning and Columbiana Counties, OH and Beaver County, PA, AB-556 (Sub-No. 2X), slip op. at 3-4 (STB served Jan. 7, 2000). Finally, the Board also has jurisdiction to revoke a previously granted exemption pursuant to 49 U.S.C. §10502(d).

III. SUMMARY OF ARGUMENT

After providing a brief background regarding the history of paper barriers and the history of rail service and creation of the paper barrier at Labadie, Ameren/MCRR will show that the Labadie paper barrier is unlawful under several alternative legal standards. Ameren Missouri and MCRR will show that the Labadie paper barrier (1) is a violation of the common carrier obligation of 49 U.S.C. § 11101; and/or (2) should be removed by the Board via revocation of the applicable exemptions in part; and/or (3) is unlawful and unenforceable under antitrust principles and 49 U.S.C. § 10101. Under any or all of these legal standards, the Board should find that the paper barrier is unlawful and unenforceable.

This Opening Evidence will also demonstrate that the paper barrier is severable from the applicable agreements and no additional compensation is owed. In addition, the Opening Evidence will address the recent Entergy case and explain why the 49 U.S.C. § 10705 standard used in that case is not applicable to the Labadie paper barrier. Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pac. R.R. and Missouri & Northern Arkansas R.R., F.D. 42104, ("Entergy"). Finally, the Opening Evidence will address some of the defenses raised by UP in its Answer.

IV. BACKGROUND AND HISTORY OF PAPER BARRIERS

Prior to the deregulatory effects of the 4R Act and the Staggers Act, it was difficult for railroads to sell, lease, or abandon rail lines. After 1980, however, increased freedoms were afforded the nation's railroads in rail line disposition, which itself led to a rebirth in the shortline railroad industry. Thousands of miles of rail lines have been sold by Class I railroads to shortline railroads over the past few decades. As time went by, concern began to arise regarding restrictive and anti-competitive contractual provisions in many of the rail line leases and sales to shortlines. See generally Review of Rail Access III, Ex Parte No. 575, slip op. at 2-4.

In 1998, Senators John McCain, the Chairman of the Senate Committee on Commerce, Science, and Transportation, and Kay Bailey Hutchison, the Chairman of the Subcommittee on Surface Transportation and Merchant Marine, asked the Board to hold hearings and develop a record on access and competition issues in the rail industry. The Board instituted Ex Parte No. 575, Review of Rail Access, and held a public hearing on April 2-3, 1998. Over 60 witnesses participated, and the Board also accepted written comments.

At the public hearing, railroads revealed that they were in discussions to develop a plan to address access and competition issues. The Board gave its approval to this private-sector approach. Revew of Rail Access, Ex Parte No. 575, slip op. at 8 (STB served April 17, 1998) ("Review of Rail Access I"). Eventually, the Association of American Railroads ("AAR") and the American Short Line and Regional Railroad Association ("ASLRRA") negotiated and signed a Railroad Industry Agreement ("RIA") to address the relationship between Class I and shortline railroads. The RIA included provisions regarding interchange commitments.[5] The Board

[5] The RIA defines paper barriers as "restrictions on interchange" and, therefore, does not appear to apply to situations like that faced at Labadie, where a contractual provision permanently prevents a railroad from serving a shipper on its rail line.

approved the rate-related aspects of the RIA under 49 U.S.C. § 10706, but the provisions applicable to interchange commitments did not require approval and were not approved by the Board. Association of American Railroads and American Short Line and Regional Railroad Association – Agreement – Application Under 49 U.S.C. 10706, F.D. S5R 100 (STB served Dec. 11, 1998).

The Western Coal Traffic League ("WCTL") believed the RIA was inadequate to address the paper barrier issue and, consequently, WCTL petitioned the Board to establish specific rules regarding paper barriers. See WCTL Petition in Review of Rail Access, Ex Parte No. 575 (filed December 21, 1998). In March 1999, the Board deferred action on WCTL's petition to allow time for the RIA to be implemented. The Board wanted to determine if the RIA was sufficient to address the paper barrier issue.

In the ensuing years, concern about interchange commitments and paper barriers continued to percolate. Representative James Sensenbrenner, Jr., Chairman of the House Committee on the Judiciary, requested that the Department of Justice provide its "assessment and views on issues involving the application of the antitrust laws in the railroad transportation industry, and, more generally, on railroad competition policy." See Ex. 3 at page 1 (Sensenbrenner letter July 15, 2004). Among other things, Chairman Sensenbrenner expressed concern about inhibiting competition through paper barriers. In reply, Assistant Attorney General William Moschella stated that paper barriers "may be exempted from the reach of the antitrust laws, depending on the scope of the approval language in each of the Board's relevant orders." See Ex. 4 at page 2 (Moschella letter Sept. 27, 2004). Mr. Moschella continued, "[i]f paper barriers were subject to the antitrust laws, they would be evaluated under Section 1 of the Sherman Act." Id.

Meanwhile, at the STB, Commissioner Mulvey indicated his own concerns about paper barriers. In one dissent, Commissioner Mulvey found the paper barrier in a lease agreement would be contrary to the public interest as a restraint of trade. Buckingham Branch Railroad Company – Lease – CSX Transportation, Inc., F.D. 34495, slip op. at 13 (STB served Nov. 5, 2004). See Section VI.C.3 for additional discussion of Buckingham Branch.

In a later case, Commissioner Mulvey issued another dissent in which he recognized that there might be some value to particular paper barriers since some transaction might not take place but for the inclusion of the paper barrier. Commissioner Mulvey then went on to state however that "paper barriers are not infinitely valuable, they should not have infinite lives, and I do not believe that the Board should continue to condone their inclusion as long as they are not time limited." Paducah & Louisville Railway, Inc.– Acquisition –CSX Transportation, Inc., F.D. 34738, slip op. at 6-7 (STB served Nov. 18, 2005).[6]

Concerns raised by Chairman Sensenbrenner and Commissioner Mulvey were just the start of an even more searching analysis of the true value and cost of paper barriers. In early 2005, the WCTL renewed its earlier petition in Ex Parte No. 575 for a rulemaking on paper barriers. See Petition in Review of Rail Access, Ex Parte No. 575 (filed March 21, 2005). WCTL stated its belief that the RIA had not sufficiently addressed the competitive problem created by paper barriers. The Board eventually sought comments on WCTL's renewed petition.

[6] In separate dissenting or commenting opinions, Vice-Chairman Mulvey later expressed concern about use of the class exemption procedure for transactions involving paper barriers or interchange commitments. Washington & Idaho Railway, Inc. – Lease and Operation Exemption – BNSF Railway Company, F.D. 35370, slip op. at 2 (STB served April 23, 2010); Northern Plains Railroad, Inc. – Lease Exemption – Soo Line Railroad Company, F.D. 35382, slip op. at 3-4 (STB served Aug. 6, 2010); Jackson & Lansing Railroad Company – Lease and Operation Exemption – Norfolk Southern Railway Company, F.D. 35411, slip op. at 3 (STB served Oct. 6, 2010). In the Entergy case, Vice-Chairman Mulvey expressed a similar view via separate comment. Entergy II, F.D. 42104, slip op. at 19-20 (STB served March 15, 2011).

See Review of Rail Access, Ex Parte No. 575 (STB served Feb. 1, 2006) ("Review of Rail Access II"). Dozens of parties participated, including Ameren Energy Fuels and Services Company ("AFS") and UP. AFS briefly described the anti-competitive nature and impact of the Labadie paper barrier, and also noted that regulatory agencies in other industries commonly address anticompetitive agreements. Comments of Ameren Energy Fuels and Services Company in Review of Rail Access, Ex Parte No. 575 (filed March 8, 2006).

Meanwhile, UP strenuously defended paper barriers in its Opening Comments in Ex Parte No. 575. UP stated that shortline leases or sales are not anti-competitive because they "do not result in any rail customers losing competitive options which they would have had [if] the shortline transaction [had] not taken place." Statement of Warren C. Wilson, Senior Director – Rail Line Planning – UP in Review of Rail Access, Ex Parte No. 575 at 4 (filed March 8, 2006). Without "interchange commitments," according to UP, "most of the shortline transactions would not have occurred at all." Id. at 12. UP also filed Reply Comments, repeating many of the same themes. In reply, UP noted that without an interchange commitment, "UP would build the going concern value ("GCV") of the traffic generated by the line into the lease rate or sale price." Reply Comments of UP in Review of Rail Access, Reply Statement of Warren C. Wilson at 2 (filed March 28, 2006). UP also noted that most interchange commitments are part of a cooperative and on-going long-term business relationship between UP and the respective shortline. UP Reply at 8, 9, and 12. The Board held another public hearing on July 27, 2006. UP's representative at the hearing clearly did not have the Labadie paper barrier in mind when he stated that "Union Pacific uses the interchange commitments only in transactions where customers have always had to route their traffic over UP. Our interchange commitments do not reduce these routing options." Statement of John Gray, UP Executive Director of the Interline

Group, Tr. at 93, Review of Rail Access (July 27, 2006). Similarly, Louis Warchot of the Association of American Railroads said an interchange commitment is merely a "cooperative agreement between the parties to jointly serve the customer," and claimed that any comparison to a non-compete agreement is "inept." Statement of Louis Warchot, AAR, Tr. at 108-109, Review of Rail Access (July 27, 2006).

In a decision served October 30, 2007, the Board proposed rules regarding disclosure of existing and proposed interchange commitments. Disclosure of Rail Interchange Commitments, Ex Parte No. 575 (Sub-No. 1) (STB served Oct. 30, 2007). These rules were later adopted by the Board in a decision served May 29, 2008 in the same docket. Alongside its October 2007 decision, the Board also issued its final decision in Review of Rail Access. In that decision, the Board declined to establish rules of general applicability regarding proposed or existing interchange commitments. Review of Rail Access III, slip op. at 8. However, the Board did state that both proposed and existing paper barriers and interchange commitments would be evaluated on a case-by-case basis. Id., slip op. at 14-17.

In the wake of the Board's decision in Review of Rail Access III, the Congressional Research Service ("CRS") issued a report entitled "Railroad Access and Competition Issues" on January 10, 2008. See Ex. 5. In part, this report provided a brief analysis of competing points of view regarding "The Railroad Competition and Service Improvement Act of 2007," legislation introduced in both the House (H.R. 2125) and Senate (S. 953) but which never became law. More broadly, though, the CRS report represented the continuing and growing interest in investigating and evaluating whether paper barriers and other limits to rail competition were defensible in light of changes in the rail industry and the economy at large.

Soon thereafter, Entergy filed the first major Complaint challenging the provisions of a paper barrier. See Complaint filed February 19, 2008 in F.D. 42104. With its Complaint, Entergy challenged an interchange commitment that affected its Independence Steam Electric Generating Station in Newark, Arkansas. Specifically, the Independence Station is located on a rail line leased by Missouri & Northern Arkansas ("MNA") from UP, and Entergy argued that the lease unlawfully restricted the ability of MNA to interchange traffic with BNSF. Entergy alleged that the restrictive provisions in the lease constituted an unreasonable practices in violation of 49 U.S.C. § 10702. In the alternative, Entergy asked the Board to partially revoke the 1992 exemption noticed in STB Docket No. 32187 for the lease, acquisition, and operation by MNA of the relevant track.

As described elsewhere in this Opening Evidence, the Board determined that Entergy's Complaint should have been brought under 49 U.S.C. § 10705, prescription of through routes, and not the unreasonable practice statute of 49 U.S.C. § 10702. See decision served June 26, 2009 ("Entergy I"). Upon receiving this further guidance from the Board, the parties filed evidence during 2010. On March 15, 2011, the Board issued its decision, finding that (1) Entergy was entitled to a BNSF-MNA route for Northern PRB traffic; (2) Entergy had not shown a BNSF-MNA through route was necessary for Southern PRB traffic; and (3) no Board majority could be reached regarding revocation of the exemption applicable to the lease and, therefore, the exemption would remain in effect. See decision served March 15, 2011 at 6, 16, and 17 ("Entergy II"). A petition for reconsideration is pending at the Board.

V. BACKGROUND AND HISTORY OF RAIL SERVICE TO LABADIE

A. Labadie's Access To More Than One Railroad

When constructed in 1970, Labadie was at the intersection of lines of the Missouri Pacific Railroad ("MP") and the Chicago, Rock Island, and Pacific Railroad ("Rock Island"). V.S. Jones at 1. UP purchased the MP line in 1982 and still owns it today. Meanwhile, the Rock Island line (now owned by MCRR) was purchased by the Southern Pacific Transportation Company ("SP") through its St. Louis Southwestern Railway ("SSW") subsidiary in 1980. St. Louis Southwestern Ry. – Purchase (Portion) – William M. Gibbons, Trustee of the Property of Chicago, Rock Island and Pac. R.R., Debtor, 363 I.C.C. 320 (1980).

When the Rock Island line was purchased out of bankruptcy, MP aggressively pursued the acquisition. Noting that MP already controlled another St. Louis to Kansas City line, the ICC determined that it would be anti-competitive to allow MP to purchase and control the Rock Island line too. St. Louis Southwestern, 363 I.C.C. 320, 406-407. Therefore, the ICC determined that SSW should be the purchaser of the Rock Island line. In making this decision, the ICC stated "we cannot permit a parallel line to be purchased for the primary purpose of avoiding competition." Id. at 407. Yet, this is exactly what UP is attempting to do by continuing to stand behind the paper barrier: UP included the paper barrier in the sale of the former Rock Island line to MCRR for the sole purpose of avoiding a competitor on that line for Labadie traffic.[7]

[7] Based on the St. Louis Southwestern precedent, the Board should similarly reject UP's efforts to control the Rock Island line's ability to provide competition by imposition of the paper barrier. Similar to MP's efforts in 1980, where MP attempted its control through an outright purchase, UP endeavors to perpetuate an illegal and anti-competitive paper barrier that restricts the traffic and shippers that can be served by the purchaser of the former Rock Island line. UP already has a roughly parallel line in place through central Missouri, and UP already has its own separate access to Labadie. Similarly, MP was trying to control the traffic between Kansas City and St.

Ameren Missouri made a [[ ]] investment in the former Rock Island line between St. Louis and Labadie, in the form of infrastructure improvements, to aid SP service to Labadie, and SP did indeed deliver coal to Labadie on the former Rock Island line between 1990 and 1996. See Ex. 6, Ex. 7 and Ex. 8; V.S. Neff at 2.

SP also had the right to operate between Kansas City and St. Louis on the MP line as a result of the UP-MP merger.[8] Union Pac. Corp., Pac. Rail System, Inc. and Union Pac. R.R. – Control – Missouri Pac. Corp. and Missouri Pac. R.R., 366 I.C.C. 459, 585-587 (1982). SP filed for abandonment of a large portion of the former Rock Island line in Missouri in 1993 (though not the portion used to serve Labadie between 1990 and 1996). The St. Louis Southwestern Ry. – Abandonment Exemption – in Gasconade, Maries, Osage, Miller, Cole, Morgan, Benton, Pettis, Henry, Johnson, Cass, and Jackson Counties, MO, AB-39 (Sub-No. 18X) (published in 58 Fed. Reg. 59278, Nov. 8, 1993). However, this proposed abandonment never came to fruition.[9]

After UP and SP announced their plan to merge in 1995, a settlement agreement (the "Settlement Agreement") was announced between UP and the BNSF Railway Company ("BNSF") whereby shippers that had previously been served by both UP and SP were assured

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Louis by acquiring a rail line parallel to its own. The Board should not allow UP to control use of the Rock Island line, just like the ICC refused to allow MP to control the same line.

[8] Ameren Missouri and MCRR are not seeking re-instatement of the trackage rights that SP obtained in the UP/MP merger that were directly related to the line MCRR purchased. In addition, it is worth noting that neither Ameren Missouri nor MCRR are seeking monetary damages for the harm caused by the paper barrier over. Ameren Missouri and MCRR are only seeking the prospective right to have MCRR's hands untied and return the unfettered rights that the Rock Island and then SP had for moving coal on or off its line via connections in St. Louis.

[9] Local shippers and others were concerned about possible abandonment of the line. See, e.g., Save the Rock Island Committee, Inc. v. The St. Louis Southwestern Ry., F.D. 41195 and 41195 (Sub-No. 1) (STB served June 20, 2000). The abandonment and the Complaint of Save the Rock Island were dismissed after MCRR began operating on the line. Id.

that BNSF would be given trackage rights over the newly-merged UP to maintain the pre-merger competition. Union Pac. Corp., Union Pac. R.R., and Missouri Pac. R.R. – Control and Merger – Southern Pac. Rail Corp., Southern Pac. Transportation Company, St. Louis Southwestern Ry., SPCSL Corp., and The Denver and Rio Grande Western R.R., F.D. 32760 (decision no. 44), 1 S.T.B. 233, 247 (n. 15), 252-254 (1996) ("UP-SP Merger"). The Settlement Agreement was imposed by the Board as a condition of the merger. Id.

As the Board is aware, in 2000, Ameren Missouri was forced to petition the Board for clarification of the UP/SP merger conditions to have Ameren declared a "2-to-1" shipper entitled to certain merger protections.[10] UP-SP Merger, F.D. 32760 (decision no. 89), 4 S.T.B. 879, 881, 885 (2000). As a result of the Board's decision in UP/SP, Labadie received access to BNSF via the UP/SP merger condition known as the "omnibus" clause that attempted to replicate SP's service on the St. Louis to Labadie section of the former SP line. This access was received by BNSF via trackage rights over the UP from their interconnection at Pacific, Missouri. V.S. Neff at 3.

Ameren Missouri invested roughly $4.7 million[11] for construction of a track connection and siding at Pacific, MO, where the UP and BNSF lines meet, in order to facilitate implementation of the Settlement Agreement and, eventually, BNSF rail service to Labadie. See

[10] Since the history of the "2-to-1" treatment of Labadie has already been considered by the Board, it will not be repeated in full in this Opening Evidence. The Verified Statements of William B. McNally and Udo A. Heinze that were submitted as part of the Petition for Clarification are included as Exhibits to this Opening Evidence. See Ex. 9 and 10. Ameren Missouri also specifically incorporates by reference in this proceeding the rest of its filings made to the Board in the UP-SP Merger docket related to Decision No. 89.

[11] In the Complaint, Ameren/MCRR stated that the investment at Pacific, MO was only $3.2 million. See Compl. ¶ 71 (n. 11). Further research has revealed that the actual investment was $4.7 million.

V.S. Neff at 3, Ex. 11 and 12. However, in the over 10 years since the Board's Decision No. 89 and the resulting multi-million dollar construction of rail facilities by Ameren Missouri at the UP-BNSF junction, Ameren Missouri has only received a handful of trains via BNSF.[12] See V.S. Jones at 2. Pursuant to the agreements with BNSF, Ameren Missouri was eligible for [[

]] See Ex. 13.

The BNSF trackage rights are not providing the full benefit of competition to Labadie particularly with respect to non-PRB coal options. V.S. Jones at 2. Ameren Missouri believes that it must seek elimination of the paper barrier in order to restore MCRR with the same rights that SP would have had with respect to the line prior to the UP/SP merger and MCRR sale. Id. Nevertheless, BNSF's current access via trackage rights for PRB coal should be maintained because (1) Ameren Missouri has already paid to establish that access through both the separate legal proceeding required to obtain Decision No. 89 and the $4.7 million Ameren Missouri paid for rail infrastructure improvements on BNSF and UP; and (2) UP by its own actions created an additional option for rail service to Labadie by UP selling the former Rock Island line to a third party (MCRR). See V.S. Jones at 3.

There is a long history of coal deliveries to Labadie using both tracks that reach Labadie. Even before Labadie was operational, Ameren Missouri, which was then doing business under the name Union Electric Company ("UE"), built a 330-foot industry track in or shortly after 1967

[12] Counsel is aware that BNSF stated in a Status Report to the STB in UP-SP Merger, FD 32760 (filed July 3, 2001), that BNSF had moved 50 trains to Labadie. Ameren Missouri did not locate any records for this many trains. Furthermore, any trains during the timeframe of BNSF's report would have been before the [[ ]].

to facilitate Rock Island railroad service. See V.S. Neff at 2; Ex. 14. The paper barrier prevents Ameren Missouri from making use of the private track for coal deliveries that it built with its own funds. Prior to its demise, the Rock Island delivered coal to Labadie. See V.S. Neff at 2; Ex. 15.

After purchasing the Rock Island, SP delivered 2.7 million tons of coal to Labadie during the 1990's using the former Rock Island line. See V.S. Neff at 2; Ex. 7; see also Ex. 16. SP moved coal to Labadie from both Colorado and Illinois. See Ex. 8. Meanwhile, the tracks now owned by UP were also historically used for transportation of coal to Labadie, and still are today. See V.S. Neff at 2; Ex. 17.

B. Creation Of The Paper Barrier In 1997 Prohibited Use Of One Of The Two Rail Lines Connecting To Labadie

1. The sale of the former Rock Island line included the Labadie paper barrier

After the UP-SP merger was approved, UP signed a Line Sale Contract[13] on November 3, 1997 to sell the former Rock Island rail line between St. Louis and Kansas City to GRC. Specifically, the transaction included sale of the line between milepost 19.0 at Vigus, MO in the east to milepost 263.5 at Pleasant Hill, MO in the west, trackage rights on UP between Vigus, MO and milepost 10.3 at Rock Island Junction, MO (for connection to the Terminal Railroad Association of St. Louis ("TRRA")), and trackage rights on UP between Pleasant Hill, MO and milepost 288.3 at Leeds Junction, MO (for connection to the Kansas City Terminal Railway Company). See Compl. at Ex. C, Line Sale Contract Recitals at 1.

UP's efforts to sell the line with the paper barrier restriction began before the UP/SP merger was approved. In fact, on March 13, 1996, one day prior to the signing of the Conceptual

[13] The Line Sale Contract is attached as Exhibit C of the Complaint.

Framework discussed in UP-SP Merger, Decision No. 89, UP representatives met with GRC and MCRR representatives to discuss selling the Rock Island line to MCRR. V.S. Neff at 4. At that meeting, John Rebensdorf of UP insisted that MCRR would not be able to serve the Labadie Plant. Also around that time a term sheet was drafted by UP which provided that service to Labadie was prohibited. V.S. Neff at 4. Following negotiations and drafting of documents on November 3, 1997, GRC Holdings and UP entered into a Line Sale Contract for most of the Rock Island line between St. Louis and Kansas City which included one part of the paper barrier preventing GRC or any railroad using the line from transporting coal to Labadie.[14] Additionally, the terms of a Trackage Rights Agreement were incorporated in the Line Sale Contract documents, and this Trackage Rights Agreement included a nearly identical paper barrier restriction. V.S. Neff at 4.

Closing on the transaction between UP and GRC/MCRR was to occur on November 10, 1997.[15] On December 24, 1997, GRC filed a notice of exemption to acquire the former Rock Island rail line from UP between milepost 19.0 at Vigus, MO and milepost 263.5 at Pleasant Hill, MO. GRC Holdings, F.D. 33537. Upon acquisition, the rail assets of the line were to be transferred to the Missouri Central Railroad Company ("MCRR") for conducting rail operations. Hence, MCRR also filed a notice of exemption in late December 1997 to acquire the rail assets of GRC, to operate the rail line, and to acquire the necessary trackage rights directly from UP. See generally Acquisition Decision in Dockets 33508 and 33537.

After these necessary filings were made at the Board, closing on the involved transactions did not occur. The months passed with no closing because, as Ameren Missouri would later

[14] See Section V.B.4 for a detailed description of the paper barrier.

[15] See Line Sale Contract § 2.

learn, GRC and MCRR were unable to raise the necessary funds to complete the purchase. GRC first approached UE on July 1, 1998 to inquire about UE's interest in financing the GRC acquisition of the line. UE declined at that time. V.S. Neff at 4.

UP issued a press release on February 12, 1999 announcing the collapse of the long-planned sale of the rail line to GRC. See Ex. 18. Acquisition Decision in Dockets 33508 and 33537, slip op. at 3. See also Ex. 19. On February 17, 1999, GRC contacted Ameren Missouri to inquire whether Ameren would be interested in financing the purchase of the former Rock Island line. Ameren was hesitant to be the financier of the line because Ameren was not interested in owning a large railroad. V.S. Neff at 5. Nevertheless, Ameren Missouri was also apprehensive about the collapse of the proposed sale to GRC and MCRR because of the concern that UP might revive SP's prior plan to abandon most or all of the line. The rail line travels through Ameren Missouri's service territory and Ameren was concerned about the effect on economic development of any potential loss of rail service to the area and the potential impact to Labadie because the "2-to-1" status of Labadie was unsettled at that time. V.S. Neff at 5. "Rail corridors, once lost, are difficult to replace." Groome & Associates, Inc. and Lee K. Groome v. Greenville County Economic Development Corp., F.D. 42087, slip op. at 3 (STB served July 27, 2005) ("Groome"). In particular, Ameren Missouri wanted to ensure that existing and future businesses would continue to have the option of rail service on the line, and Ameren Missouri also wanted to preserve the second physical rail access to the Labadie plant. V.S. Neff at 5.

In March 1999, Ameren negotiated a Shareholder Agreement, a Stock Purchase Agreement, and a Management Agreement with GRC that would govern the financing of the

purchase of the MCRR line.[16] See Ex. 20, 21 and 22. Under these agreements, Ameren would put [[ ]] The terms of funding for the MCRR addressed the [[ ]] Ex. 21. Ameren did put [[ ]][17] because the transaction did not close as planned and Ameren Missouri understood that UP again said the deal was terminated.[18] V.S. Neff at 5-6.

GRC and MCRR then commenced a lawsuit against UP as a means to force the transaction to go forward. See Ex. 26. On June 28, 1999, GRC and MCRR filed their lawsuit against UP in a Missouri state court, arguing that UP should be forced to go forward with the transaction. Id.[19]

In the intervening months, GRC continued its attempts to persuade Ameren Missouri to invest in the MCRR acquisition and explain how GRC thought that traffic could be expanded on the MCRR. See Ex. 27. However, the months continued to pass with no closing and no resolution of the lawsuit. As the danger of an abandonment of the line loomed, GRC approached Ameren Missouri again in August 1999 to ask for financial assistance in funding the acquisition. V.S. Neff at 6. Based on the threat of an abandonment and in order to preserve the second rail

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[16] In March 1999, the STB also denied WCTL's renewed petition to look at paper barriers in Ex Parte 575 which added to the uncertainty about the Board's resolve to address anticompetitive paper barriers.

[17] See Ex. 22, Stock Purchase Agreement at § 10.1.

[18] [[ ]] See Ex. 23, 24 and 25.

[19] UP later removed to federal court in the Western District of Missouri.

line to Labadie, Ameren Missouri agreed to come in as the eleventh-hour financier[20] and provide a majority of the financing for the acquisition so that the transaction could move forward. V.S. Neff at 6. See Ex. 21 at § 4.11. On August 20, 1999, GRC's counsel informed UP [[

]] See Ex. 29 and Ex. 30.[21]

Upon closing, GRC sold a majority interest in MCRR to an affiliate of Ameren Missouri. V.S. Neff at 4; Ameren Corporation – Control Exemption – Missouri Central R.R., F.D. 33805 (STB served Oct. 22, 1999).

Ameren Missouri had no role in the negotiation or drafting of the contents of the Line Sale Contract, the Trackage Rights Agreement, or the Interchange Agreements[22] because the deal terms had been reached long before Ameren Missouri was approached by GRC. V.S. Neff at 6. [[

]] See Ex. 29. [[

]] See Ex. 29.

[20] UP's documents produced in discovery confirm [[

]] See Ex. 28.

[21] Documents produced by UP in discovery reveal that, [[

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See Ex. 31. Plaintiff's counsel cannot share this document with Ameren Missouri and MCRR due to the Highly Confidential designation. However, no evidence to date shows that Ameren Missouri was aware of this correspondence.

[22] The signed Interchange Agreements can be found at Ex. 32. Unsigned copies of the Interchange Agreements were attached to the Ameren/MCRR Complaint.

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UP's statement was made in the context of the dispute with GRC and MCRR about whether the transaction should go forward at all. As noted above, UP stated in February 1999 that the deal was off because, as was later learned, GRC and MCRR could not secure financing to meet UP's asking price. See Ex. 18.

Closing on the sale to GRC and MCRR finally occurred on October 7, 1999. See Ex. 33. The GRC and MCRR lawsuit against UP was also dismissed on October 7, 1999. See Ex. 34.

2. UP does not dispute the basic fact that the paper barrier bars MCRR from meeting its common carrier obligation to provide rail service

UP has not disputed the basic fact that the contractual restrictions in the Line Sale Contract and its incorporated [[ ]] Trackage Rights Agreement completely bar MCRR from providing rail service to the Labadie Station, a shipper on the MCRR line. In particular, paragraphs 33 and 35 of the Complaint provided quotations from the Line Sale Contract and the incorporated Trackage Rights Agreement; in response, UP agreed that the quotations were accurate. UP Answer ¶¶ 33, 35. Several years ago UP admitted that the sale to MCRR "exclude[d] access to a facility located on the shortline." Reply Comments of Union Pacific Railroad Company, at 10, in Ex Parte No. 575 (filed March 28, 2006). Based on this simple fact,

judgment for Ameren/MCRR is warranted on the authority of 49 U.S.C. § 11101, Railroad Ventures, and other authority.

3. Operations on MCRR are currently provided by a lessee

Rail operations on MCRR are provided by Central Midland Railway Company ("Central Midland") pursuant to a lease with MCRR.[23] V.S. Neff at 8; Central Midland Ry. – Operation Exemption – Lines of Missouri Central R.R., F.D. 33988 (STB served Jan. 29, 2001); Central Midland Ry. – Lease and Operation Exemption – Missouri Central R.R., F.D. 34363 (STB served Feb. 11, 2004). Central Midland is owned by Progressive Rail Incorporated. Progressive Rail Inc. – Acquisition of Control Exemption – Central Midland Ry., F.D. 35051 (STB served July 5, 2007).

Pursuant to the terms of the lease between MCRR and Central Midland, [[

]] See V.S. Neff at 8, and Ex. 36, Section III.

[23] [[

]] V.S. Neff at 8; and Ex. 35.

4. Description Of The Labadie Paper Barrier

The Labadie paper barrier[24] actually consists of several separate, but substantially the same, restrictions contained in the Line Sale Contract and the incorporated Trackage Rights Agreement.[25] The major restrictions are:

> Line Sale Contract, Section 3.a, Page 5
> In addition, neither MCRR nor its successors and assigns nor any tenant can serve the facilities of Union Electric at or near Labadie, Missouri, over the line of railroad being acquired (including over trackage rights on either end of the line which is being purchased) either directly over the existing switch or via new construction.
>
> Trackage Rights Agreement, Section 3(iv)
> [MCRR shall not] [m]ove any Equipment containing coal over the Joint Trackage which is destined to the power generating facilities of Union Electric (or any successor) at Labadie, Missouri.
>
> Trackage Rights Agreement, Exhibit B, General Conditions, Section 1.8
> MC may not act as Haulage Carrier or Handling Carrier or transport any coal for Union Electric or its successors or assigns at Labadie, Missouri.

See Compl. at Ex. C and D. The effect of these restrictions is to bar the MCRR or any lessee from serving Labadie despite the fact that MCRR's tracks connect directly to Labadie.

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[24] Ameren/MCRR address these provisions as one paper barrier because the provisions are all aimed at one purpose: to permanently prohibit coal moving to Labadie. Ameren/MCRR believe that removal of these provisions should accomplish the elimination of the Labadie paper barrier. However, Ameren/MCRR request that the Board's order include language that prohibits UP from directly or indirectly adhering or enforcing any provision that would restrict MCRR's common carrier obligation to provide service to Labadie. This would appropriately cover any interchange agreement between MCRR and UP that might be necessary and are regularly entered into between railroads. The Board has authority to intervene in such disputes. See 49 U.S.C. § 10703. Furthermore, the language would make it clear that [[

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[25] The Line Sale Contract incorporates the Trackage Rights Agreement. See Compl. at Ex. C, Line Sale Contract § 2(b)(3) (it is stated that [[

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VI. ARGUMENT

A. The Labadie Paper Barrier Violates 49 U.S.C. § 11101 And Public Policy

The Labadie paper barrier is unique in certain respects and should not be viewed as an "interchange commitment" as it is distinguishable from the interchange commitments discussed in Entergy I and Review of Rail Access III. Nevertheless, certain aspects of those two decisions are instructive.

Analysis of an interchange commitment should include evaluation of whether it is causing or would cause a violation of the Interstate Commerce Act. See Review of Rail Access III, slip op. at 15; Entergy I, slip op. at 3. The Labadie paper barrier is causing a violation of perhaps the most basic tenet of the Act, the common carrier obligation of 49 U.S.C. § 11101, because the paper barrier prohibits MCRR from serving a shipper located on MCRR tracks.[26]

1. The common carrier obligation is foundational

Railroads have a common carrier obligation under 49 U.S.C. § 11101 to serve shippers on their rail lines. Pejepscot Industrial Park, Inc. d/b/a Grimmel Industries – Petition for Declaratory Order, F.D. 33989, slip op. at 14 (STB served May 15, 2003). (finding that, where there is no embargo or abandonment, railroad "had an absolute duty to provide rates and service...upon reasonable request, and that its failure to perform that duty was a violation of section 11101"; see also Tanner & Co. et al. v. Chicago, Burlington & Quincy R.R. Co., 53 I.C.C. 401, 406 (1919); Pacolet Mfg. Operating Allowance, 210 I.C.C. 475, 477 (1935).

The common carrier obligation is perhaps the most basic and foundational tenet of federal rail transportation law. See Common Carrier Obligation of Railroads, Transcript of

[26] Ameren/MCRR will use the term "interchange commitment" when describing the Board's standard set forth in Review of Rail Access III and Entergy I, but will continue to use the term "paper barrier" to describe the unique and much more onerous restriction at Labadie.

Public Hearing at 33-34 (Ex Parte No. 677) (April 24, 2008) (statement of Chairman Nottingham) (Noting that the common carrier obligation goes back to Roman law and stating that "the heart of the Board's mission is our responsibility to serve as a forum for resolving disputes...regarding whether...the railroads are carrying out that obligation to provide service on reasonable request.") (internal quotes omitted). While railroads are permitted to fulfill their reasonable contractual commitments before responding to reasonable requests, "[c]ommitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable." 49 U.S.C. § 11101(a).

2. The paper barrier prevents MCRR from fulfilling its common carrier obligation

The tracks of MCRR directly connect to Labadie and, consequently, MCRR has a common carrier obligation under 49 U.S.C. § 11101 to provide rail service to Ameren Missouri at Labadie. Indeed, the tracks were used for many years to provide rail service to Labadie by both the Rock Island and SP. UE built a 330-foot private industry track during Labadie's construction in the late 1960's to facilitate such rail service. See V.S. Neff at 2; Ex.14. However, the Labadie paper barrier now completely prevents MCRR from using these same tracks to reach Labadie and prevents MCRR from participating in service to Labadie at all. The Labadie paper barrier unequivocally "deprive[s]" the MCRR of its ability to respond a reasonable request for coal rail service to Labadie.[27] This reason alone is sufficient for the Board

[27] As the Board is aware MCRR is owned by an Ameren affiliate so any attempt to formally make a reasonable request for service to Labadie would be futile since Ameren Missouri is well aware of the legal impediment of MCRR to provide such service. V.S. Neff at 8. "The law does not require the doing of a futile act." Ohio v. Roberts, 448 U.S. 56, 74 (1980). See also Wilson v. City of San Jose, 111 F.3d 688, 693-694 (9th Cir. 1997) ("The law does not require a party to perform a useless act."); Corsini v. United Healthcare Corp., 965 F. Supp 265, 269 (D.R.I. 1997) ("The law does not require parties to engage in meaningless acts or to needlessly squander resources as a prerequisite to commencing litigation.").

to declare the paper barrier void as a matter of law. MCRR must be permitted to provide transportation to the Labadie facility, which is a shipper located directly on MCRR's tracks.

"As a common carrier," the MCRR "must provide rail service...upon reasonable request." Pejepscot, slip op. at 8. MCRR has not invoked abandonment or embargo, which are the "only appropriate mechanisms a railroad may employ to excuse itself...from its common carrier obligations." Id., at 13. Indeed, MCRR wants to provide rail service to Labadie, primarily for the purpose of transporting coal to Labadie, but the paper barrier prevents MCRR from doing so. V.S. Neff at 8.

3. Contractual restrictions are void if they contravene the common carrier obligation

Contractual terms are void if they prevent a railroad from meeting its common carrier obligation. This principle has been stated, in one form or another, by the Board, the ICC, and the courts. Railroad Ventures, AB-556 (Sub-No. 2X), slip op. at 3 (STB served Jan. 7, 2000) ("contractual restrictions that unreasonably interfere with common carrier operations are deemed void as contrary to public policy"); Hanson Natural Resources Company – Non-Common Carrier Status – Petition for a Declaratory Order, F.D. 32248, slip op. at 3 (ICC served Dec. 5, 1994) ("once common carrier operations commence over all or part of this line, any contractual restrictions that unreasonably interfere with those common carrier operations will be deemed void as contrary to public policy"). Cf. United States v. Baltimore & Ohio R.R. Co., 333 U.S. 169, 177 (1948) (holding that a rail line owner may not "enforce conditions upon its use which conflict with the power of Congress to regulate railroads so as to secure equality of treatment of those whom the railroads serve").

Based on Railroad Ventures and other precedent, the Board should find that the Labadie paper barrier is unlawful and cannot be enforced. Review of Rail Access III, slip op. at 14

(Board says it will restrict freedom of contract if paper barrier constitutes or contributes to violation of Interstate Commerce Act); cf. Chicago & N. W. Trans. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) (after shipper files claim for damages in state court against railroad for failure to provide rail service, court holds that the state law cause of action is invalid because the ICC specifically authorized railroad's cessation of service).[28] The paper barrier limitation in the Line Sale Contract and incorporated Track Rights Agreement does more than "unreasonably interfere" with MCRR's common carrier operations to Labadie; it completely prohibits such operations in perpetuity.

Similarly, railroads are not permitted to set contract terms that eliminate shippers' rights, such as the right to receive common carrier rail service. The paper barrier limitation in the Line Sale Contract and the incorporated Trackage Rights Agreement represents an attempt to set contract terms which "contract away the statutory rights" of Ameren Missouri to receive service from MCRR and for MCRR to provide such service. This is in clear violation of recent Board precedent. Entergy I, slip op. at 7. See also Review of Rail Access III, slip op. at 13 ("Board approval of a line sale or lease does not relieve any carrier of its statutory obligation to...fulfill common carrier obligations"). The right of Ameren Missouri to receive service from MCRR and MCRR to provide such service "cannot be contracted away by an agreement between carriers." Entergy I, slip op. at 3 (original emphasis omitted).

4. UP cannot contract away the rights of Ameren Missouri to receive rail service at Labadie

The common carrier obligation consists of not just the duty of a railroad to serve a shipper, but also the right of that shipper to receive such service. Hence, the Board entertains

[28] As discussed in Section VI.B., the Board did not specifically authorize the paper barrier restriction in the acquisition and trackage rights exemption transaction.

complaints from shippers about failures to provide rail service, and has awarded damages to shippers in such cases. See, e.g., Groome, slip op. at 15-19; see also Investigation into Limitations of Carrier Service on C.O.D. and Freight-Collect Shipments, 343 I.C.C. 692, 729 (1973) ("C.O.D. and Freight Collect") ("There is a longstanding doctrine that a right accrues to a shipper whenever a carrier unjustifiably fails or refuses to transport property."). Because Labadie is "located upon the line" of MCRR, Ameren Missouri has "the legal right to look to" MCRR for transportation. Coal Rates on the Stony Fork Branch, 26 I.C.C. 168, 174 (1913). The paper barrier unlawfully deprives Ameren Missouri of that service.[29]

The right held by Ameren Missouri to receive rail service at Labadie cannot be contracted away by UP and MCRR. Entergy I, slip op. at 7 ("UP and MNA cannot contract away the statutory rights of a third party or neglect their own obligations under the statute."); see also Muschany v. United States, 324 U.S. 49, 66-67 (1945) (courts will not enforce contracts contrary to "statutory enactments").

The common carrier obligation of MCRR to serve Labadie cannot be extinguished by UP, MCRR, or any other party. The paper barrier restriction in the Line Sale Contract and the incorporated Trackage Rights Agreement unlawfully limit the scope of 49 U.S.C. § 11101 based upon the identity of the shipper, Ameren Missouri. As stated by the ICC:

> We think that a common carrier is bound to accept a car for transportation whenever such a car is offered at places where it can reasonably receive it. To determine whether or not it will transport the car, the carrier can not lawfully inquire into the ownership and origin of the contents, nor into the route over which it has been moved in order to reach its rails. It can only ask that it be given reasonable compensation for the service it performs.

[29] MCRR wants to provide the service, but UP stands in the way. Ameren Missouri could seek damages for UP's refusal to allow MCRR to serve Labadie, but is focused on prospective relief.

St. Louis, Springfield & Peoria R.R. et al. v. Peoria & Pekin Union Ry., 26 I.C.C. 226, 237 (1913); see also C.O.D. and Freight Collect, 343 I.C.C. at 760 ("When...carriers decline to make available or refuse to render services...and where such...refusals are made on the basis of *who* pays the freight charges [or] the destination of the shipment...those carriers interfere improperly with the rights of shippers") (emphasis in original). The Labadie paper barrier unlawfully singles out Ameren Missouri and Labadie to receive different treatment from the railroad line directly connect to the plant. "One carrier is required to carry the same classes of traffic as every other carrier, and it can not evade its statutory duty by restricting its profession." Lake-and-Rail Butter and Egg Rates, 29 I.C.C. 45, 47 (1914).

5. Under all factors mentioned by the Board in Review Of Rail Access, the paper barrier must be voided

In Review of Rail Access III, the Board recently provided some basic guidance for interchange commitments and evaluation of their lawfulness. The Board noted that it would not provide rules of general applicability for interchange commitments, but that it would evaluate each one on a case-by-case basis. Review of Rail Access III, slip op. at 1, 7. The Board also explained the rationale behind many interchange commitments, the benefits of certain interchange commitments, and some factors that the Board would use when evaluating interchange commitments. As described below, application of the principles enunciated in Review of Rail Access III reveals the patently unreasonable and unlawful nature of the Labadie paper barrier.

(a) The Labadie paper barrier is not beneficial to MCRR or the public

The Board has also stated that shortlines provide specialized attention and better service to shippers. Review of Rail Access III at 3, 7. Again, these benefits have not accrued to Ameren Missouri because the Labadie paper barrier completely prohibits MCRR service of any kind to Labadie in perpetuity. While the Board notes that many interchange commitments are beneficial to the shortline involved and/or to the shipping public, there are no such benefits from the Labadie paper barrier. The Board has also stated that shortline railroads often benefit from "lower costs" of operating and often provide "better service" to customers. Id. at 3. Yet, the MCRR cannot utilize these "lower costs" or provide "better service" at Labadie because the Labadie paper barrier permanently and completely bars service to Labadie despite MCRR tracks reaching Labadie. Such a restriction is plainly uneconomic and inefficient for all parties concerned – the MCRR, the railroad industry as a whole, Ameren Missouri, and Ameren Missouri's customers. The only party who benefits is UP.

Interchange commitments also benefit shippers and communities, according to the Board, by preserving rail transportation to localities that would have been lost absent the interchange commitment. Id. at 7. Evaluation of the Labadie paper barrier from the perspective of Ameren Missouri shows that the opposite is true: the paper barrier removed rail service that previously existed. As described above, the former Rock Island railroad tracks were used by both the Rock Island and SP to provide transportation of coal to Labadie. However, the Labadie paper barrier meant that this option was removed.

The prohibition on rail service to Labadie also means that the growth of MCRR has been hampered, not aided, by the paper barrier. Cf. id. at 4 (Board states that one benefit of many interchange commitments is that they allow the shortline to grow). In fact, abandonment of the

former Rock Island line at some point is potentially more likely due to the paper barrier, because MCRR is prohibited from carrying traffic (and earning revenue) that would be otherwise available to it. The Board also suggested that some paper barriers might benefit shortline railroads due to "favorable terms," and that elimination of paper barriers could cause financial problems for these shortline railroads. Id. at 12. This is not the case with respect to the Labadie paper barrier, which only prevents MCRR from access to revenue. The opportunity to serve Labadie would create a more financially robust MCRR which would also benefit local communities served by MCRR due to increasing the money available for maintenance of the line and purchasing new equipment. As described furthermore below, the MCRR purchase price was substantial and not discounted to be favorable to MCRR.

Concern for possible abandonment of lightly-used rail lines was also mentioned by the Board as a reason to support some paper barriers. Id. at 13. Specifically, the Board stated its concern that, without the option to enter into interchange commitments, certain rail lines might simply be abandoned because they cannot be operated profitably within a Class I railroad and the Class I would not sell them to a shortline without a guarantee of interchange traffic. Id. Again, this is not the case with the MCRR, which is actually more likely to be abandoned due to the Labadie paper barrier (because, right now, MCRR is prohibited from carrying traffic that the line carried in the past; this is separate and apart from service that UP provides to Labadie).

If the paper barrier were removed, the MCRR would be aided because MCRR would be able to compete for the service to the largest customer on the MCRR line – the Labadie plant. A more financially robust MCRR would also benefit local communities served by MCRR due to increasing the money available for maintenance of the line and purchasing new equipment.

(b) The Labadie paper barrier is contrary to the public interest

When faced with an interchange commitment, the Board will determine if it is contrary to the public interest. Review of Rail Access III at 7-8. In other words, the Board will determine if the interchange commitment is "unduly restrictive" or "unwarranted under the circumstances." Id. The Board will also weigh the benefits of the interchange commitment against its potential for harm. Id. at 8.

Assessment of the Labadie paper barrier under this standard shows that it is contrary to the public interest. First, the Labadie paper barrier is unduly restrictive because there is no time limitation, as the Line Sale Contract create a permanent restriction. While it is true that the Trackage Rights Agreement has a term of [[

]][30] Moreover, the paper barrier consists of a blanket restriction on service to Labadie. There is no way for MCRR to pay a higher rental fee to serve Labadie, as in the Entergy case. In brief, the Labadie paper barrier is a total ban in virtual perpetuity and, consequently, it should be subject to the highest level of Board scrutiny. Review of Rail Access III, slip op. at 15.

Second, the Labadie paper barrier is unwarranted under the circumstances. This is not a situation where the paper barrier has benefited the MCRR and the communities it serves by enabling the "rebirth" and "growth" of rail service along the MCRR corridor, or the "strengthening" of the MCRR. Id. at 2, 7, 9. Instead, the paper barrier has actually hampered the efforts of MCRR to develop and thrive by completely preventing MCRR from serving Labadie. MCRR has been permanently denied the ability to participate in Labadie transportation and earn

[30] The statutory common carrier obligation must trump the apparent attempt by UP to nominally retain ownership in this [[ ]] trackage rights agreement, lest other parties try to subvert statutory requirements with similar stub end/steel barrier provisions.

the revenue associated with it. This is fundamentally different from the Entergy case, where the shortline railroad participates in movement of coal traffic to Entergy's Independence Station regardless of whether UP or BNSF is the origin carrier. Indeed, in the Entergy case, the shortline railroad involved, the Missouri & Northern Arkansas Railroad Company ("MN&A"), is opposed to Entergy's claims, denied any unlawful behavior, and moved for dismissal. See MN&A's Answer and Motion to Dismiss or Discontinue (both filed Aug. 17, 2009) in Entergy, F.D. 42104. Conversely, the MCRR has joined in and completely agrees with Ameren Missouri's Complaint.

In preventing MCRR from having any ability to carry coal to Labadie, the paper barrier has hurt rail service along the MCRR rail line by preventing MCRR from having sufficient revenue to maintain and repair its tracks. There is no legitimate business purpose for the paper barrier, as it only exists to exclude MCRR from using its rail line to serve a customer on MCRR's tracks. The cost of the Labadie paper barrier – in harm to the MCRR, harm to Ameren Missouri, harm to local communities via increased cost of electricity to customers of Ameren Missouri, and elimination of competition – is far in excess of any benefits. Consol. Rail Corp. v. ICC, 646 F. 2d 642, 650, 653 (D.C. Cir. 1981).

(c) MCRR is not trying to create an option that did not exist previously

The Board has stated that shipper opposition to certain interchange commitments is misplaced because "affected shippers may not have had competitive options before the sale or lease and thus may be no worse off as a result of the interchange commitment." Review of Rail Access III, slip op. at 8. Thus, a shipper challenging an interchange commitment might be trying to "create a new competitive option that did not exist prior to the sale or lease." Id. at 9. This is not true with respect to Ameren/MCRR's Complaint. Ameren Missouri is not seeking to create a

new rail option at Labadie that never existed in the past. Before the paper barrier, Labadie received coal trains via both sets of tracks, but the paper barrier results in only UP's tracks able to be used for service to Labadie.

In defense of the paper barrier, UP is likely to argue that competition at Labadie was preserved by the UP-BNSF Settlement Agreement as part of the UP-SP merger. While Labadie does currently have access to BNSF service via trackage rights over UP, the Settlement Agreement does not alter the basic unlawfulness of the Labadie paper barrier for several reasons. First, as described more fully in Section VI.A., the common carrier obligation of 49 U.S.C. § 11101 does not depend on the number of other rail options that a given shipper may have. Thus, both MCRR's obligation to serve Labadie, and Ameren Missouri's right to receive service from MCRR at Labadie, does not depend on the service that other railroads can or cannot provide to Labadie. Second, UP's own actions created a third option for rail service to Labadie by selling the former Rock Island line to the MCRR. This fact is even more compelling because UP sold the line to MCRR with the restriction before the 2-to-1 status of Labadie was settled. Third, Ameren Missouri expended significant funds to enable BNSF access and, therefore, Ameren Missouri has actually paid for the BNSF option. MCRR's use of its own tracks to provide rail service to Labadie presents true competition and restores the unfettered access that existed prior to UP's involvement.

Due to the fact that Labadie has always been a competitively-served destination and, in fact, was built at the intersection of two separate railroads, UP cannot claim that it will lose differential pricing power through the removal of the Labadie paper barrier. Cf. Review of Rail Access I, slip op. at 2 (explaining that "captive" traffic generally pays higher rates due to differential pricing); Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520, 526-527 (1985). UP

currently competes with BNSF for transport of PRB coal to Labadie, and inserting MCRR as the destination carrier would not change that existing competition other than making interchange with MCRR the possible endpoint of competition between UP and BNSF.

6. Regardless of the number of options that may exist for transportation to Labadie, the paper barrier still violates 49 U.S.C. § 11101

The common carrier obligation applies regardless of the number of transportation options that a shipper might have. There is no exception in the language of 49 U.S.C. § 11101 that states a railroad's obligation to provide service on its own rail line is waived if rail service from a different rail carrier on a different rail line is possible. In short, it is irrelevant if Labadie has one or two or ten other rail options via other rail carriers. Congress has put no such limitation in 49 U.S.C. § 11101, and the Board may not add such a limitation.

The MCRR rail line serving Labadie has not been embargoed or abandoned, therefore there is no justification for any restriction on MCRR's right to serve Labadie via its own tracks. "The only appropriate mechanisms a railroad may employ to excuse itself, permanently or temporarily, from its common carrier obligations on a line of railroad are abandonment or embargo." Pejepscot, slip op. at 13. Where a rail line has not been embargoed or abandoned, a railroad has an "absolute duty" to provide rates and service. Id. at 14. MCRR wants to fulfill this duty, but the paper barrier prevents it from doing so.

7. UP created a new option when it sold the former Rock Island line

UP should be estopped from arguing that restoration of MCRR's right to serve Labadie "creates" a third option for Labadie rail service. It was UP itself that created the "third" option. First, in anticipation of the UP-SP merger, UP entered into a Settlement Agreement with BNSF that guaranteed continued two-carrier competition for shippers, like Labadie, that were served by both SP and UP. This Settlement Agreement was announced in a UP press release on September

26, 1995. The UP-SP merger was approved by the Board on August 6, 1996, and the Board imposed the UP-BNSF Settlement Agreement as a condition on the merger. UP-SP Merger, 1 S.T.B. 233 (1996).

As a result of the above actions of UP in 1995 and 1996, Labadie should have been assured of continued two-carrier service. However, Labadie was treated differently and was ultimately forced to seek relief from the Board. During the period of differing treatment of Labadie, UP chose to create a third option for service to Labadie by voluntarily selling the former Rock Island Line to a third party – MCRR by way of GRC. UP Answer ¶ 22. Closing on this transaction occurred in 1999. See Acquisition Decision in Dockets 33508 and 33537, slip op. at 3; see also UP Answer ¶ 27. Based on simple chronology, it was UP that voluntarily created the third option for rail service to Labadie by selling the former Rock Island Line to a third party.

UP cannot be heard to assert that its creation of a third option (through the Line Sale Contract and incorporated Trackage Rights Agreement) was not voluntary. Groome, slip op. at 6 ("notwithstanding what may have been the motivations or expectations of the parties....[the Board] must resolve this matter in accord with the law"). The paper barrier provisions in the Line Sale Contract and incorporated Trackage Rights Agreement are plainly unlawful under 49 U.S.C. § 11101. UP should not be able to enforce the paper barrier provision of the Line Sale Contract and incorporated Trackage Rights Agreement because the provisions contravene the common carrier obligation of 49 U.S.C. § 11101. Muschany, 324 U.S. at 66-67 (courts will not enforce contracts contrary to "statutory enactments"); see also United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 42-44 (1987); 15 Corbin on Contracts § 79.1.

8. Voiding the paper barrier will have negligible effect on UP

The MCRR is not a large railroad; it does not physically extend beyond the borders of the state of Missouri. As pertinent here, connections are with the UP at Labadie, with UP at Vigus, and with the TRRA at Rock Island Junction on the leased portion. If the paper barrier were eliminated, then MCRR could, at most, provide transportation from the TRRA connection to the Labadie Station, a distance of only about 34 miles. UP would still be able to provide Labadie rail operations exactly as it does today on its own line, whether in single-line movement from the PRB or in some other manner.

In other words, with the paper barrier in place, the situation looks like this from UP's perspective: UP and BNSF can both provide service to Labadie directly from the PRB and UP or BNSF can provide direct or joint-line service for other coal regions. If the paper barrier were removed, the situation from UP's perspective would look like this: UP could still carry coal to Labadie in a single-line movement from the PRB or in direct or joint-line service from other mine origins. UP would still be able to favor its long-haul (See Review of Rail Access III, slip op. at 8), and would still be able to connect with other railroads. The only difference is that UP would be forced to compete with MCRR service on a parallel line for the last few miles of Labadie traffic.

With the paper barrier removed, MCRR could compete with UP for the destination service to Labadie. However, MCRR does not serve any coal mines, so at least one other railroad would have to be involved in the movement. If Labadie continued to obtain coal from the PRB, then UP and BNSF would still be competing for the long movement from the PRB to the St. Louis area – the only difference would be that MCRR could fulfill its common carrier obligation and respond to reasonable requests for service to provide the transportation for the last

few miles. Of course, interchanges are generally less efficient than direct service and, it would seem, UP should have an advantage in keeping the entire PRB movement rather than merely the lion's share.[31]

UP would not suffer any recognizable adverse effects from elimination of the Labadie paper barrier.[32] Allowing MCRR to transport coal to Labadie would not destroy UP's differential pricing because Labadie has always had dual access; therefore, UP's differential pricing for Labadie service would not change. Similarly, allowing MCRR to transport coal to Labadie would not destroy any UP expectation of guaranteed revenue from Labadie service because Labadie has always had competition. UP's only expectation of future revenue is based on the current contract that exists between UP and Ameren Missouri.[33] Outside that contract, and once that contract ends, the coal traffic to Labadie could be switched to BNSF. Hence, there is no need to "compensate UP for the lost traffic" (Entergy I, slip op. at 11) because elimination of the paper barrier would not change UP's position vis a vie Labadie traffic – that it must compete for the traffic.

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[31] Moreover, Rock Island Junction is further from the PRB than Labadie, so UP should have a natural advantage in competing for the Labadie PRB traffic. In short, eliminating the paper barrier would not alter UP's opportunity to earn revenue.

[32] Indeed, UP offered to allow MCRR to carry coal to Labadie in 2000. UP-SP Merger, F.D. 32760 (Sub-No. 21), slip op. at 19 (STB served Dec. 15, 2000). MCRR did not accept this offer at the time because of the time and cost that the rehabilitation of the MCRR would have taken at that time. See V.S. Neff at 3. As shown in UP's Highly Confidential documents produced in discovery, that offer [[

]] See Ex. 37.

[33] For the last several years, UP has provided rail transportation for most coal deliveries to Labadie in single-line service from the PRB pursuant to a contract with Ameren Missouri. The contract will expire [[ ]].

B. The Board Should Revoke The Exemptions In Part To Remove The Paper Barrier

Alternatively, Ameren/MCRR are requesting that the Board revoke the exemptions in Acquisition Decision in Dockets 33508 and 33537, to the extent that such exemptions apply to the Labadie paper barrier. A petition to revoke an exemption for a transaction may be filed at any time. 49 C.F.R. § 1121.4(f). As the parties seeking revocation, Ameren/MCRR have the burden to show that the revocation criteria of 49 U.S.C. § 10502(d) have been met. Under 49 U.S.C. § 10502(d), "[t]he Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title."

Ameren/MCRR seek to have the sale and trackage rights exemptions partially revoked to the extent that the exemptions cover the prohibition on MCRR providing transportation to Labadie. 49 U.S.C. § 10502(d) ("The Board may revoke an exemption, to the extent it specifies..."), cf. Review of Rail Access III, slip op. at 15 (stating that shippers may seek to "partially revoke an exemption granted under 49 U.S.C. 10502").

Revocation is appropriate here because "application of the Board's regulation" and full review of the paper barrier inserted in the agreements not reviewed by the Board under the exemption "is necessary to carry out the rail transportation policy set forth in 49 U.S.C. 10101." Entergy I, slip op. at 11-12. In determining whether to revoke an exemption, the Board evaluates (1) whether the carrier possesses substantial market power; (2) whether regulation is necessary to protect against abuses of that market power; and (3) whether regulation would better advance the objectives of the rail transportation policy and the public interest. Id. at 12. Evaluation of the Labadie paper barrier under this standard shows that revocation is unequivocally necessary.

First, UP possesses market power because, while the lines of both UP and MCRR directly connect to Labadie, the paper barrier imposed by UP prevents MCRR from serving Labadie. Second, regulation is necessary to prevent abuse of UP's market power because UP's defense of the paper barrier bars MCRR from serving Labadie. Third, regulation would clearly advance the objectives of the rail transportation policy and the public interest in numerous ways. In particular:

- The paper barrier means that contractual restrictions, and not competition and demand for rail services, are setting rates for rail transportation, thereby violating policy 49 U.S.C. § 10101(1).

- The paper barrier hampers MCRR's ability to earn "adequate revenues," thereby thwarting a "safe and efficient rail transportation system" and violating policy 49 U.S.C. § 10101(3).

- The paper barrier prevents the "development...of a sound transportation system...to meet the needs of the public" by preventing MCRR from having the opportunity to carry coal to Labadie, thereby violating policy 49 U.S.C. § 10101(4).

- Similarly, it is not a "sound economic condition" for MCRR to be prevented from serving a customer directly on MCRR's tracks, violating policy 49 U.S.C. § 10101(5).

- The paper barrier fails to encourage honest and efficient management of UP and MCRR because it prevents them from prospering or failing on their merits and not based on a restriction which prohibits MCRR from serving a shipper on its tracks, thereby violating policy 49 U.S.C. § 10101(9).

- The paper barrier discriminates against Ameren Missouri compared to other shippers who are able to use the railroads that directly connect to them, violating policy 49 U.S.C. § 10101(12). The paper barrier also discriminates against MCRR in violation of policy 49 U.S.C. § 10101(12); it prevents MCRR from being treated like other railroads, which are able to serve shippers located on their tracks.[34]

[34] The discriminatory effect of the paper barrier also violates 49 U.S.C. § 10741. The Labadie paper barrier represents unreasonable discrimination by UP against Labadie traffic because it "subject[s] a...place" and "type of traffic" to a complete prohibition on service by MCRR. The prohibition qualifies as unreasonable discrimination because it treats Labadie's traffic completely differently than "like and contemporaneous service in the transportation of a like kind of traffic

- Additionally, the paper barrier violates 49 U.S.C. § 10101(12) because it represents an "undue concentration of market power" over Labadie transportation by prohibiting MCRR from participating in such transportation.

Revocation, in part, is necessary because there is no legitimate purpose served by the paper barrier; it does not foster any of the policy items in § 10101. Furthermore, the paper barrier violates other provisions of the Interstate Commerce Act. The Labadie paper barrier also harms the public interest. The Board can and should revoke the exemptions in order to allow scrutiny of the agreements underlying the transactions and, ultimately, the Board should remove the paper barrier. See Riverview Trenton R.R. – Acquisition and Operation Exemption – Crown Enterprises, Inc., F.D. 33980 (STB served Feb. 15, 2002) ("We will revoke the exemption . . . because this proposal warrants more detailed scrutiny than is afforded by the existing record.")

C. The Labadie Paper Barrier Is Anti-Competitive In Violation of Antitrust Principles And 49 U.S.C. § 10101

This section will address the antitrust concerns that are raised by the Labadie paper barrier. Any competition restriction imposed on a buyer by a seller that is ancillary to a sale of assets is a restraint of trade. Ameren Missouri and MCRR hereinafter describe the "rule of reason" standard applied to such ancillary restraints, and show that under the rule of reason standard the Labadie paper barrier is clearly unreasonable because (1) there is no time limitation on the absolute ban which is ipso facto unreasonable and (2) the paper barrier permits the current

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under substantially similar circumstances." 49 U.S.C. § 10741(a)(2). In other words, unlike Labadie, other rail customers that receive coal deliveries and that are served by separate tracks of two railroads are able to obtain coal rail deliveries from both rail lines connected to the plant. Labadie, however, suffers from the discrimination of not being able to receive deliveries via one of the railroads whose tracks actually serve the facility.

carriers that serve Labadie to restrict opportunities and options that Labadie would otherwise have for coal sourcing.[35]

1. Relevant History of the Labadie Paper Barrier

The long history of the former Rock Island line now owned by MCRR has been recited in various contexts and proceedings. Without repeating all of the details, it is noteworthy for this discussion to understand that it is undisputed that the Labadie plant had two separate rail lines that provided separate direct rail service to the plant prior to the UP/SP Merger and subsequent sale of the MCRR with the paper barrier. See UP-SP Merger, F.D. 32760, Decision No. 89 (STB served June 1, 2000) ("There is no dispute as to the 2-to-1 status of UE's Labadie plant. "). Thus, UP has a line that provides direct access to Labadie and is a direct competitor to the line now owned by MCRR, which is the line that provided a second direct access to the plant for its 2-to-1 status. In addition, the following facts are also particularly relevant to this discussion and events that led up to the MCRR sale with the paper barrier which should be viewed as an unreasonable restraint on trade:

- When the Rock Island line was being purchased out of bankruptcy, MP aggressively pursued the acquisition. Noting that MP already controlled another St. Louis to Kansas City line, the ICC determined that it would be anti-competitive to allow MP to purchase and control the Rock Island line too. St. Louis Southwestern, 363 I.C.C. at 406-407. Therefore, the ICC determined that SSW should be the purchaser of the Rock Island line. In making this decision, the ICC stated "we cannot permit a parallel line to be purchased for the primary purpose of avoiding competition." Id. at 407.

[35] Although addressing the "rule of reason" standard above, Ameren Missouri and MCRR also agree with the Board that market allocation agreements between direct competitors are *per se* unreasonable. Review of Rail Access III, slip op. at 10 (n. 25). Obviously, the Labadie paper barrier would also be unlawful under this *per se* approach.

- UP acquired MP and thereby obtained the line parallel to the Rock Island line referenced in St. Louis Southwestern, 366 I.C.C. at 459. As part of the UP/MP merger, SP was awarded trackage rights on UP between Kansas City and St. Louis in order to enhance competition and to enable SP to avoid the expense of upgrading the recently acquired Rock Island. Id. at 580.
- On August 3, 1995, UP announced its plan to merge with SP. See Ex. 38.
- On September 26, 1995, UP announced a Settlement Agreement with BNSF to address competition issues. See Ex. 39.
- Between September 29, 1995 and November 1, 1995, UP made several statements to Ameren Missouri that the September 26, 1995 press release was not meant to include Labadie and offered other options. UP admitted discussing the sale of the Rock Island line to BNSF but no agreement was reached and UP reiterated that BNSF would not be given access to Labadie. See Ex. 10.
- On March 13, 1996, UP met with GRC Holdings and MCRR to discuss the possible sale of the line and UP stated that no service to Labadie would be permitted as part of the sale. V.S. Neff at 4.
- On August 6, 1996, STB approved the merger of UP and SP. UP-SP Merger, 1 STB 233 (1996).
- On November 3, 1997, UP and GRC Holdings entered into the Line Sale Contract and set terms of trackage rights agreements that included the paper barrier with a virtually perpetual ban on coal service to Labadie. See Compl. Ex. C. The line sale finally closed in late 1999 after a tumultuous period that included financing problems and litigation between UP and GRC to force the sale to closing. V.S. Neff at 4-6.

- In 2000, Ameren was forced to petition the Board for clarification of the UP/SP merger conditions to have Ameren declared a "2-to-1" shipper entitled to certain merger protections. Union Pac. Corp. – Control and Merger – Southern Pac. Corp., 4 S.T.B. 879, 881 (2000). As a result of the Board's decision in UP/SP, Labadie received access to BNSF via the UP/SP merger condition known as the "omnibus" clause that attempted to replicate SP's service on the St. Louis to Labadie section of the former SP line. This access was received by BNSF via trackage rights over the UP from their interconnection at Pacific, Missouri. Id. at 885; V.S. Neff at 3. Ameren Missouri paid for the new connecting track needed for BNSF's access. V.S. Neff at 3.

2. The legal authority of the Board over antitrust issues

It is undisputed that Congress and national public policy strongly favor competition in the railroad industry. This is demonstrated by the heavy emphasis placed on the promotion of competition in the rail transportation policy ("RTP") enacted by Congress in 49 U.S.C. § 10101. Indeed, one third of the points that Congress has mandated and codified in the RTP of 49 U.S.C. § 10101 charge the STB to act as a competition-enhancing agency:

> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; . . .
> (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
> (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
> (7) to reduce regulatory barriers to entry into and exit from the industry; . . . and
> (12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination.

(Emphasis added.)

The STB has authority to implement antitrust principles in the railroad industry. For example, the Board must consider antitrust principles when evaluating proposed railroad

combinations. 49 C.F.R. § 1180.1(c)(2). Moreover, the Board is specifically authorized to enforce antitrust laws found at 15 U.S.C. §§ 13, 14, 18 and 19. See 15 U.S.C. § 21(a). Thus, the STB has explicit and implicit authority to address antitrust and competition issues in the rail industry. The broader issue of competition is addressed throughout this filing. This section addresses the antitrust laws and theories that the Board can apply explicitly, or by analogy, to the MCRR paper barrier in order to find that it is an unreasonable restraint that should be declared unenforceable.

3. The anticompetitive nature of paper barriers has been recognized by at least one Board member

The anticompetitive nature of paper barriers has been recognized by members of the Board in recent decisions. For example, in Buckingham Branch, F.D. 34495, slip op. at 13-14 (STB served Nov. 5, 2004) (Mulvey, dissenting), Commissioner Mulvey noted that paper barriers seriously impede competition:

> I find that the lease agreement between Buckingham Branch Railroad and CSXT includes a fundamentally anti-competitive provision—the erection of what is essentially a "paper barrier"—that would operate as a restraint of trade in rail transportation in the region. Paper barriers are clauses in contracts for the sale or lease of rail lines to shortline carriers by which Class I carrier sellers seek to ensure that the traffic originated or terminated by shortline carriers on the segments (sold or leased) continues to flow over the lines of the seller to the maximum extent possible. As such, these restrictions effectively tie the shortline to a single Class I carrier, thereby restricting the flow of interstate commerce and reducing the potential public benefits of the lease transaction.
>
> . . . . .
>
> I concede that paper barriers result from voluntary negotiations between private parties. However, that these provisions conflict with the notion of avoiding restraints of trade is beyond doubt. I do not believe that the Board should continue to condone this practice. While I would prefer not to interfere with contracts between private individuals, I believe the Board should do so when contractual provisions run counter to public policy and the public interest as a whole. **Thus, while restrictions on interchange may be in the private interests of two railroads, they nevertheless operate as a restraint of trade and run counter to the public interest.**

Id. (emphasis added). These concerns are reflected in other decisions that address paper barriers. See Indiana & Ohio Central Railroad, Inc. – Acquisition and Operation Exemption – CSX Transportation, Inc., F.D. 34536, slip op. at 9-10 (STB served Aug. 23, 2005) (Mulvey, dissenting) ("As Class I carriers continue to use these exemptions to shave off thousands of miles of track by subdividing [and] downsizing into smaller transactions, the Board should more regularly require full applications to allow for complete review of the transactions and their potential impact on railroad employees, rail shippers, and the national transportation system. While I would prefer not to interfere with contracts between private parties, I believe that the Board must do so when contractual provisions run counter to key elements of our national transportation policy and the broader public interest as a whole"); Paducah & Louisville Railway, F.D. 34738, slip op. at 6-7 (STB served Nov. 18, 2005) (Mulvey, dissenting) ("[P]aper barriers are not infinitely valuable, they should not have infinite lives, and I do not believe that the Board should continue to condone their inclusion so long as they are not time limited. ").

4. Overview of Antitrust Law Relevant to Paper Barriers

Section 1 of the Sherman Act (15 U.S.C. § 1) states, in pertinent part, that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 1 is very broad and the Supreme Court has recognized that a literal reading would cover virtually every contract. Nat'l Soc'y of Prof. Eng'rs v. U.S., 435 U.S. 679, 688 (1978). Thus, the judiciary has developed the "rule of reason" for evaluating certain contractual restraints, including restrictive covenants that are ancillary to legitimate transactions. Id. at 690. The Department of Justice has stated that if "... paper barriers were subject to the antitrust laws, they would be evaluated under section 1 of the Sherman Act. The Department would examine

whether the restraint is ancillary to the sale of the trackage – i.e. whether the restraint is reasonably necessary to achieve the pro-competitive benefits of the sale." See Ex. 4.[36] As explained below, the Labadie paper barrier ancillary to the sale of the MCRR line is an unreasonable restraint and the Board should find the Labadie paper barrier unlawful.

5. Judicial Decisions Regarding Ancillary Non-Compete Agreements Are Instructive

It is instructive to look at the approach taken under the antitrust laws by courts and other agencies for evaluating whether a competition-restricting condition, similar to a paper barrier, is an unreasonable restraint on competition. One court found that the non-competition clauses in an agreement for the sale of a business were lawful because they were reasonably limited both in geographic scope and in duration to the minimum necessary to protect the legitimate property interests purchased by the covenantee, e.g., protecting the goodwill of the purchased business. Lektro-Vend Corp. v. Vendo Co., 403 F. Supp 527, 532 (N.D. Ill. 1975), aff'd, 545 F. 2d 1050 (7th Cir. 1976). See also, Eichorn v. AT&T, 248 F.3d 131, 145-146 (3rd Cir. 2001) (hornbook law that a covenant not to compete ancillary to the sale of a business does not violate the Sherman Act if reasonably limited in time and territory).

The Antitrust Division of the Department of Justice ("DOJ") has also challenged restrictive covenants in otherwise legitimate agreements when the restraint unreasonably harms

[36] Ameren Missouri and MCRR assert that the issue of antitrust immunity is not relevant here since, to the extent that the STB approved the sale and trackage rights associated with the MCRR acquisition, the STB's "approval" was by exemption only and the STB did not specifically review and approve the paper barrier provisions of the agreements. Likewise, Ameren Missouri and MCRR are not challenging the overall approval of the UP/SP merger which permitted UP to acquire the SP's parallel line in Missouri as part of the larger merger transaction, nor seeking past damages but merely seeking that the anticompetitive paper barrier provisions be declared unlawful on a going forward basis. For a further discussion on antitrust immunity in the railroad industry and the potential repeal of those immunities, see Darren Bush Testimony, Before the House Judiciary Committee Antitrust Task Force, February 25, 2008, attached as Ex. 40.

competition. In one recent case, the DOJ charged two digital jukebox platform producers with entering into a non-compete agreement ancillary to an otherwise legitimate venture that caused the UK-based producer not to proceed with its plans to enter the U.S. digital jukebox platform market, a highly concentrated market with only two producers. See Competitive Impact Statement, filed Sept. 2, 2005 by DOJ in United States v. Ecast, Inc. and NSM Music Group, LTD, No. 05-1754 (D.D.C.). See, Ex. 41. DOJ alleged that the non-compete agreement constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. According to the DOJ, the UK-producer had planned on competing in the U.S. market, which likely would have stimulated competition and resulted in better customer choices at lower prices. Thus, even where the non-compete provision is entered into as part of a larger legitimate agreement, it must be scrutinized for its competitive effects and prohibited if the harm to competition is too great. In Ecast, a final judgment was issued enjoining and restraining the parties from directly or indirectly adhering to or enforcing the section of the larger agreement or any other contractual provision that had the same effect. Final Judgment, U.S. v. Ecast, Inc. and NSM Music Group, LTD, No. 05-1754 (D.D.C., Dec. 16, 2005). See Ex. 42.

(a) A Total And Permanent Ban Is, By Definition, An Unreasonable Restraint

A cornerstone of determining the reasonableness of an ancillary restraint is the scope of restraint with respect to duration, territory and type of product. Antitrust Law Developments (Sixth), Volume I at 130, ABA Section of Antitrust Law (6th ed. 2007). A covenant not to compete ancillary to the sale of a business does not violate the Sherman Act if reasonably limited in time and territory. Eichorn, 248 F.3d at 145. Eichorn involved a restraint that restricted employees of a telecommunications company from securing employment at an AT&T affiliate for an eight month period following the spin off and sale of affiliated companies and services.

The court found that the eight month no-hire agreement was not unreasonably broad since the technical skills of these employees would be needed for at least the eight month period and there were many (over twenty) other employers beside AT&T in the market to whom they could sell their services. Id.

In the Lektro-Vend case discussed above, the court found a 10-year covenant not to compete was reasonable in light of the facts of the case. The purchaser had paid a high price for the business and insisted on the restrictive covenant to protect its investment. The court concluded that the time frame was reasonable to protect the buyer's legitimate property interests and noted that the 10-year non-compete period coincided with the period for a purchase option and certain profit sharing provisions.

Other courts have found 10 year and 5 year restrictive covenants reasonable under the facts of each case. See Alders v. AFA Corp., 353 F. Supp 654, 656-657 (S.D. Fla. 1973) (five-year time limitation and geographic restriction found reasonable); Cincinnati, P., B.S. & Pomeroy Packet Co. v. Bay, 200 U.S. 179 (1906) (five year limitation for sale of vessel found reasonable where the sale price factored in the covenant); Tri-Continental Fin. Corp. v. Tropical Marine Enter., Inc., 265 F. 2d 619 (1959) (sale of vessel with 10-year restrictive covenant was reasonable because there were ten or more carriers that could provide competition in the market and the restriction was limited in scope).

In a case that is similar to the paper barrier situation, a court found that a time-limited ancillary restraint place in the sale of property did not unreasonably foreclose competition after looking at a variety of factors, including the availability of other viable sites for the purchaser. In Sound Ship Bldg. Corp. v. Bethlehem Steel Corp., 387 F. Supp 252 (D. N.J. 1975), the seller sold property with a 20-year restrictive covenant before seller was even aware of the buyer and

its potential to compete with the seller. The restrictive covenant prohibited the property from being used in competition with the seller. Id. at 254. The court, in looking at how the restraint effected competition, stated: "Standing alone, a 20-year restrictive covenant is unreasonable. The fact, however, that the covenant was imposed (a) by a seller who retained at close proximity a similar business interest (b) in a market where viable alternative sites were available (c) during a period of economic decline in the business, enables the court to find the covenant reasonable in times." Id. at 256.

What all these cases show is that courts will look at the particular circumstances in determining whether a covenant is reasonable in terms of the time frame included in the restraint. Where the time frame is found unreasonable, the court will deem the provision unenforceable. No antitrust case has been revealed that would support a finding that a competitive restraint imposed in a sale of assets with no limit in time is reasonable. With respect to the Labadie paper barrier, there is no time limit to the restraint. Thus, the Board should find the Labadie paper barrier unreasonable and unenforceable.

(b) Additional Factors Supporting a Finding of an Unreasonable Restraint

The Labadie paper barrier can also be found an unreasonable restraint of trade when the overall market conditions are evaluated. In reviewing UP's response to Ameren Missouri's and MCRR's Interrogatory #13, it is instructive to understand why UP incorrectly believes the Labadie paper barrier was reasonable. In that discovery request, Ameren Missouri and MCRR asked UP to explain ¶ 91 of its Answer, where UP seemed to imply that MCRR and UP are not direct competitors. In its response, UP stated:

> Subject to and without waiving its objections, UP states that complainants are subject to contractual restrictions that prevent MCRR from delivering coal to Labadie using the Former Rock Island Line or the UP lines over which MCRR

> has trackage rights, and MCRR currently has no other lines that serve Labadie, and in that sense, UP and MCRR are not and never have been "direct competitors," contrary to the allegations in Paragraph 91 of the Complaint.

See Ex. 43. With this bizarre response, UP is basically turning antitrust law on its head. UP is saying that because UP and MCRR entered into an agreement not to compete, they are not competitors even though they both have the ability to serve Labadie. If this were the manner in which antitrust law were applied, then no anticompetitive contract to divide a market would ever be found unlawful, because, according to UP, the contract trumps the reality of whether two companies have the ability to compete. UP's view contravenes the entire purpose of American antitrust law. The Board should reject UP's convoluted and backwards interpretation of antitrust principles, and use its authority to declare the Labadie paper barrier unlawful. UP's view also stands in stark contrast to ICC's determination that the UP and Rock Island lines between Kansas City and St. Louis were competitive when the ICC refused to let UP's predecessor purchase the parallel line in St. Louis Southwestern.

Moreover, the Labadie paper barrier unreasonably restricts Ameren Missouri's opportunity and options for coal sourcing outside of the PRB. Both UP and BNSF serve the PRB and assuming for the sake of argument that UP and BNSF have the same economic interest to compete for the movement of coal to Labadie,[37] they clearly do not have the same incentive to move Illinois basin coal. Based on the collective experience of the operating companies of

[37] In making this assumption, Ameren Missouri does not concede that UP and BNSF do in fact compete for PRB traffic. As the Board is likely aware, there are examples in the industry that seem to indicate that UP and BNSF may in fact not be fully competing in the PRB market. As noted in Neff's Verification Statement, even with the rights that Ameren fought for and paid for with the connecting track at Pacific, BNSF has moved very little coal to Labadie and the incumbent carrier, UP, has retained the business at prices that continue to climb by significant increments notwithstanding the dual PRB access to Labadie. V.S. Neff at 7.

Ameren at other plants with scrubbers installed, it is quite possible that coal from the Illinois Basin would be more competitively priced on a delivered basis than Powder River Basin coal under the right competitive environment. See V.S. Neff at 7. Recent extreme rail rate increases by the two western carriers experienced by PRB coal shippers [[

]] have made other coal basins, such as the Illinois Basin, a more attractive option, especially to utilities in close proximity such as Ameren Missouri. Id. at 7; see also, Ex. 44. However, allowing the illegal and anticompetitive paper barrier on MCRR to continue will effectively prevent Ameren Missouri from accessing the lower cost Illinois Basin coal. Of the existing two carriers serving Labadie over the UP tracks, BNSF has no access to mines in the Illinois Basin. Furthermore, neither BNSF nor UP have an incentive to quote competitive rates to counter its more lucrative PRB movements.[38] MCRR has direct access to CSX, NS and CN through the TRRA in St. Louis, none of which serve the PRB and, therefore, could promote competitive Illinois Basin coal rates to Labadie, something neither western carrier has shown any inclination to do at other Ameren locations.

While Ameren Missouri asserts that price is not the issue here and the opportunity and option for competition is the real issue, an example of the lack of incentive to competitively bid

[38] The Labadie paper barrier also does not fall into the case cited by the Board in Review of Rail Access III, slip op. at 2, whereby a shipper aggrieved by a paper barrier that protects a railroad's long haul could petition the Board for rate relief. Labadie cannot seek such rate relief because it is was not and would not be captive to UP. Id. at 9. Moreover, UP cannot claim that the removal of the Labadie paper barrier would harm it by making it subject to rate relief claims by Ameren Missouri at the Board since Labadie could not challenge any UP quoted rate for the non-MCRR portion of the movement even if MCRR was legally permitted to give Ameren Missouri a contract for that portion of the movement since Labadie was not and would not be captive to UP. Cf. Comments of Ameren Corporation in Competition in the Railroad Industry, STB Ex Parte 705 (filed Apr. 13, 2011).

for non-PRB coal by one of the western carriers is illuminating.[39] For example, in October 2007, Ameren requested a bid from BNSF for PRB and Illinois basin coal to Ameren's Sioux (Machens destination) and Rush Island (Rush Tower destination) plants. BNSF's confidential offer shows that [[

]] See V.S. Jones at 3; Ex. 45.

It is common sense that railroads like UP have a preference for long-haul-high density routes like the PRB. See State of Wyoming Rail Plan (October 2004), located at http://www.dot.state.wy.us/webdav/site/wydot/shared/Planning/Wyoming%20State%20Rail%20Plan.pdf ("large carriers sought to reduce costs and focus capital on long-haul routes. Most Wyoming rail trackage is in fact a part of the very long-haul routes that have received considerable investment by the large railways"). Such preference in and of itself is not

[39] Ameren Missouri offers this example only as an illustration of the statements made in the Complaint at ¶¶ 52 and 57 because Ameren Missouri does not believe that a comparative analysis of PRB versus Illinois Basin coal transportation prices is necessary to find that the Labadie paper barrier is unlawful. In fact, Ameren Missouri agreed to withdraw certain Requests for Production based upon an understanding reached between counsel in discovery meet and confer discussions on this issue.

unlawful.[40] The fact is that BNSF and UP will seek to protect their significant investment in the PRB infrastructure and maximize their profit by refusing to undercut their long-haul move.[41] This means that for Labadie to benefit from competition between PRB coal and Illinois coal, the STB must lift the Labadie paper barrier restrictions and restore unfettered rights of access to St. Louis.

For all the above reasons, allowing this restriction which prevents MCRR's unfettered ability to use its own track to connect with CSX, NS, CN or UP in St. Louis is unreasonable and should be declared unenforceable. The Board's charge with respect to competition issues and implementing antitrust principles means that the Board must find that the Labadie paper barrier is improper, unlawful, and anticompetitive. The Labadie paper barrier is an unreasonable restraint of trade that prevents MCRR from serving Labadie in perpetuity. The paper barrier is a perpetual market allocation agreement between direct competitors – tracks of both UP and MCRR reach Labadie, but MCRR is completely prevented in perpetuity from using its tracks to provide transportation to Labadie. Indeed, if the Board does not find the perpetual paper barrier in this case to be an unreasonable restraint of trade, then Ameren Missouri fails to see how the

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[40] See 49 U.S.C. § 10705(a)(2). Nevertheless, that this statute does not apply to the Labadie paper barrier because there are two separate rail lines that reach Labadie.

[41] A look at UP's 1999 and 2009 Analyst Fact Books further illustrates this point by showing that the investment that UP would desire to protect is very significant to UP. These reports show that UP's annual PRB coal traffic is the largest segment of UP's energy business and that the percentage of volume of PRB coal is significantly larger when compared to other coal basins and that growth of non-PRB coal has been minimal over that 10 year period. See http://www.up.com/investors/factbooks/index.shtml. Thus, UP has a business incentive to continue to focus on the PRB business over other coal basins. While the business incentive to maximize profits on heavily invested infrastructure is not necessarily unlawful, that incentive when viewed in terms of the paper barrier provisions imposed on the sale and trackage rights supports a finding that the restriction is an unreasonable restraint of trade.

Board could ever declare any paper barrier or interchange commitment unlawful. That would be contrary to law and public policy.

D. No Additional Or Adjustment To Compensation Is Due And The Paper Barrier Is Severable From The Agreements

The Board has indicated that adjustment of the compensation paid by a shortline to the selling railroad may be necessary in some cases. Review of Rail Access III, slip op. at 12. However, no such problem exists with respect to the Labadie paper barrier because MCRR paid at or above the full market price for the rail line. As described further below, this fact combined with the severability provision in the agreement means that is no compensation adjustment is necessary for removal of the unlawful paper barrier.[42]

1. UP did not "discount" the price for the MCRR in exchange for an assurance of traffic

The Board has stated that the "spin-off" of some shortline railroads may have been done at a reduced or discounted price where an interchange commitment was involved because the selling railroad "was assured of retaining a portion of the revenues from the traffic" on the sold rail line. Review of Rail Access III, slip op. at 4. However, there was or should never have been any "assur[ance]" that UP would retain the delivery of coal to Labadie because there had historically been competition at Labadie between UP and SP. The sale of the former Rock Island track to MCRR did not change the fact that UP was not assured of Labadie traffic. UP's only expectation was for revenue during the limited term of any contract between Ameren and UP for Labadie service. For rail service outside the terms of the contract, transportation to Labadie could be provided by SP (before the UP-SP merger) or BNSF (after the UP-SP merger).

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[42] Ameren/MCRR are not conceding that compensation would ever be due to a party that imposed an unlawful and unenforceable provision in a contract. However, Ameren/MCRR address this issue because it was raised in the discussion of interchange commitments in Review of Rail Access III.

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The reason that UP did not discount the sale price for MCRR is obvious. The sale of the former Rock Island line to MCRR did not and does not affect UP's ability to provide transportation to Labadie. UP's physical ability to serve Labadie was unchanged by the sale to MCRR and there was no need to calculate the net present value of possible future lost revenue as a result of the sale. See Review of Rail Access III, slip op. at 10 (Board assumes selling railroads determine the discounted sale price for shortlines by calculating the net present value of revenue that would be lost without the interchange commitment).[44] In fact, UP's position vis a vie Labadie was enhanced because at the time of the sale, Labadie's 2-to-1 status under the UP/SP merger was still in flux. Thus, this is not a situation where the MCRR is asking the Board to "override" a "determination of reasonable compensation as negotiated" by private parties (Id. at 11) because the evidence shows that no compensation adjustment is necessary. Instead, MCRR merely seeks that the Board declare void the provisions of the Line Sale Contract and Trackage Rights Agreement that conflict with the federal common carrier obligation of railroads.

Several years after the fact, UP claimed that MCRR paid the NLV for the line. UP Reply Comments in Review of Rail Access, Ex Parte No. 575 (filed March 28, 2006) at 6, 10, Wilson

[44] The multi-year odyssey of GRC in seeking funding for the purchase of the MCRR also shows that UP did not discount the price to allow a quick and easy sale to a shortline.

V.S. at 8, and Wilscon V.S. at 11. In the same proceeding, UP asserted that the sale price to MCRR did not include the going concern value ("GCV"). Statement of Warren C. Wilson in Review of Rail Access, Ex Parte No. 575 (filed March 8, 2006) at 10 (n. 5). See also UP Reply Comments, Wilson V.S. at 2-3 ("Without interchange commitments, UP would build the going concern value ("GCV") of the traffic generated by the line into the lease rate or sale price.").

UP also admitted that, if no sale to MCRR occurred, the former Rock Island line would have been abandoned. UP Reply Comments (Wilson V.S. at 8 and 11). With this admission, UP has torpedoed its specious claim that the GCV of the rail line was higher than the NLV.[45] Indeed, the GCV may have even been negative if UP was on the cusp of abandoning the rail line. In short, then, UP has admitted that MCRR already paid the full NLV, and UP has also implicitly admitted that the line had no value as a going concern. In any event, UP should not be permitted to claim a GCV related to Labadie traffic when it is unlawful for UP to impose a paper barrier that attempted to make Labadie traffic captive when it had not been before. Thus, no further compensation is due to UP when the Labadie paper barrier is eliminated.

3. The Labadie paper barrier did not allow acquisition by the MCRR for "little or no upfront capital"

The value of many interchange commitments, according to the Board, is that they allowed the shortline railroad to acquire its rail line for "little or no upfront capital investment." Id. at 4. While this fact may be true for many interchange commitments, MCRR paid [[

]] for the former Rock Island line, most of which was out of service at the time. The payment of this significant sum of money shows that the Labadie paper barrier did not allow

[45] Any claim by UP for more than the NLV for the MCRR line is also belied by the fact that UP provides in the Trackage Rights Agreement that [[

]] See, Compl., Ex. D, § 7.3.

MCRR an easy entry into the railroad business. Moreover, as described more fully above, [[

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4. The paper barrier is severable from the Line Sale Contract and the incorporated Trackage Rights Agreement

In Review of Rail Access III, the Board expressed concern that past sales or leases might be completely undone as a result of voiding interchange commitment or paper barrier provisions. Id. at 12. Such a concern does not apply to the Labadie paper barrier. [[

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The Line Sale Contract provides that it is governed by Missouri law. See Compl. Ex. C, § 10d. While the Board is not required to implement state law in deciding these federal issues, Missouri law on severability may be instructive to the Board for the declaration of the unenforceability of these unlawful provisions. Under Missouri law, courts have endorsed severability of provisions from larger contracts especially when the contact contains a severability provision. See Koontz v. Hannibal Sav. & Ins. Co., 42 Mo. 126 (1868) (rejecting the doctrine of "void in part, void *in toto*" in favor of preserving the contract so long as the void portions can be separated); Manfredi v. Blue Cross & Blue Shield of Kansas City, No. WD 71150, 2011 WL 588618, *6 (Mo. Ct. App. Feb. 22, 2011) ("Whether a contract is severable . . . depends on the circumstances of the case and is largely a question of the parties' intent." (quoting Shaffer v. Royal Gate Dodge, Inc., 300 S.W.3d 556, 561 (Mo. Ct. App. 2009);" Shaffer, 300 S.W.3d at 561 ("The absence of a severability clause tends to indicate that a contract is entire and not severable").

E. Section 10705 Does Not Apply To Labadie Paper Barrier

Unlike the Entergy case, 49 U.S.C. § 10705 does not govern the Board's review of Ameren/MCRR's Complaint. A physically separate route already exists to Labadie via the former Rock Island line, and was used in the past by the Rock Island and SP for coal deliveries

to Labadie.[46] The Labadie paper barrier completely bars MCRR from serving Labadie on these tracks which connect to Labadie. In addition, SP in the past moved Illinois Basin coal to Labadie which neither UP nor BNSF have demonstrated incentive or desire to move to Labadie today. V.S. Neff at 7-8. Restoring SP's rights to interchange coal at St. Louis for delivery to Labadie will return status quo ante the sale and UP/SP merger for Ameren Missouri's coal source options. Under these circumstances, the Board does not need to prescribe a through route; instead, the Board should declare that the status quo ante the sale should apply.

The Labadie paper barrier is an unlawful paper barrier that permanently prevents the MCRR from carrying any coal to Labadie despite the fact that the MCRR owns tracks that directly serve Labadie. In this sense, the paper barrier is radically different from and significantly more restrictive than the interchange commitment in the Entergy case, as shown in the chart below. Unlike the restriction in the Entergy case, the Labadie paper barrier functions as an agreement between two direct competitors to divide a market, with one of those competitors claiming the entire market in perpetuity. Tracks of both UP and MCRR directly serve Labadie, yet the paper barrier unlawfully prevents MCRR from serving Labadie.

[46] If for some reason the Board does believe 49 U.S.C. § 10705 is implicated, the burden of proof should be on UP to justify its actions which in effect cancelled all through routes involving MCRR providing any service to Labadie on the former SP line. Intramodal Rail Competition, 1 I.C.C.2d 822, 830 (n. 9) (1985).

Factor	Labadie	Entergy
tracks of two separate railroads reach shipper	yes	no
direct service by two railroads prior to the transaction	yes	no
interchange routes existed prior to the transaction	yes	no
shortline railroad supports removal of paper barrier	yes	no
type of paper barrier	sale, with incorporated trackage rights agreement	lease
absolute prohibition on rail service requested by shipper	yes	no
paper barrier is specifically directed at one commodity	yes	no
paper barrier is specifically directed at one shipper	yes	no
paper barrier term unlimited in duration	yes	no

Unlike the Entergy case, the Labadie paper barrier does not implicate 49 U.S.C. § 10705 and the Board's ability to prescribe a new through route. This is a not a situation where there is a bottleneck carrier (like MNA in the Entergy case) that refuses or is limited in its ability to interchange with a second carrier. A completely separate route already exists, but is barred by the terms of the paper barrier. Instead, the Labadie paper barrier completely bars a railroad from serving Labadie despite the fact that its own separate second set of tracks actually connect to Labadie. With these circumstances, the Board does not need to prescribe a through route; instead, the Board should declare unlawful the anticompetitive restriction at Labadie. It does not matter if the purported "new through route" (which is not actually new because the former Rock Island line was used to serve Labadie in the past) is shorter or more efficient than the existing UP route[47], because the paper barrier is an agreement between horizontal competitors.

[47] See 49 U.S.C. §§ 10705(a)(2)(B), (C).

F. UP's Defenses Raised In Its Answer Do Not Apply

1. UP's assertion of unclean hands, waiver and estoppel are misplaced

The Answer filed by UP includes the defenses of unclean hands, waiver, and estoppel. See UP Answer Defenses at ¶¶ 6-7. With these defenses, UP appears likely to argue that the paper barrier legitimately bars MCRR from fulfilling its common carrier duties because MCRR allegedly agreed to the Line Sale Contract and the Trackage Rights Agreement.[48] UP's argument necessarily fails for the simple reason that neither statutory obligations nor statutory rights can be contracted away by any party.

Further, even if the right of Ameren Missouri to receive MCRR rail service at Labadie could be contracted away by UP and MCRR (which it cannot), it is plainly incorrect to claim that Ameren Missouri waived its right, or has unclean hands, or should be estopped from asserting such right. The terms of the Line Sale Contract and the incorporated Trackage Rights Agreement were reached in 1997, long before any Ameren entity stepped in to provide the majority of financing for the transaction in 1999. See Compl. at Ex. C (showing Line Sale Contract included all terms of the Trackage Rights Agreement and was signed on November 3, 1997). Ameren Missouri had no role in the negotiation or determination of the paper barrier terms. [[

]] See Ex. 29. This was long before Ameren Missouri got involved. Without involvement, there can be no "unclean hands," no estoppel, and no waiver.

[48] MCRR is a signatory to the Trackage Rights Agreement. MCRR did not sign the Line Sale Contract, but did sign a "Notice of Assignment, Assumption and Consent" regarding the Line Sale Contract.

MCRR wants to fulfill its common carrier obligation, but UP stands in the way. It is no defense to claim unclean hands, waiver, or estoppel based on MCRR allegedly agreeing to the paper barrier restrictions. The paper barrier is a clear violation of 49 U.S.C. § 11101 and, consequently, will not be enforced by the courts. Muschany, 324 U.S. at 66-67. The common carrier obligation also represents a basic public policy of the United States; it was part of the common law and was enacted in the 19th century by Congress as a cornerstone of the Interstate Commerce Act. As a fundamental public policy, the common carrier obligation cannot be abrogated by a paper barrier provision in a contract. Marshall v. The Baltimore & Ohio R.R. Co., 57 U.S. 314, 334 (1854); superseded by statute (on other grounds), 28 U.S.C. § 1332(c) ("Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided.").[49]

In short, UP's asserted defenses of unclean hands, waiver, and estoppel necessarily fail because the common law "will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals or public policy." Id., 57 U.S. at 334.

2. Ameren Missouri and MCRR properly state a claim upon which relief can be granted

UP asserts that Ameren Missouri and MCRR have failed to state a claim upon which relief may be granted. UP Answer Defense ¶¶ 1, 2, 4. This boilerplate defense cannot save the paper barrier, which unlawfully prohibits MCRR from fulfilling its statutory common carrier

[49] Voiding the entire Line Sale Contact and entire Trackage Rights Agreement is not necessary because both have severability clauses. Moreover, it would be unduly problematic to undo a sale transaction that occurred over ten years ago. The Board need only declare the paper barrier provisions void.

obligation. The paper barrier also unlawfully prevents Ameren Missouri from obtaining MCRR service. As mentioned previously, the Board has authority to declare contractual terms, such as paper barriers, void if they conflict with common carrier operations. Railroad Ventures, slip op. at 3-4.

The Board has also recently stated that it has authority to review the "lawfulness" of the terms of interchange commitments and whether they are contrary to the public interest. Review of Rail Access III, slip op. at 7. The paper barrier that restricts MCRR's operations is even more onerous because it is a permanent and complete ban on service to Labadie, and the Board can surely review its lawfulness. As such, Ameren Missouri and MCRR have properly stated a claim upon which relief may be granted.

Furthermore, the Board clearly stated that existing interchange commitments would be evaluated under the Interstate Commerce Act and must conform to the Act. Specifically, the Board stated that "shippers may, on a case-by-case basis, attempt to show that a particular interchange commitment is causing, or would cause, a violation of the Interstate Commerce Act." Id. at 15. Ameren Missouri and MCRR have followed exactly this path by showing the paper barrier "is causing" and "would cause" a violation of the most basic tenet of the Interstate Commerce Act, the common carrier obligation. MCRR wants to provide service to Labadie, and Ameren Missouri wants to receive such service; it is only UP that defends the alleged legitimacy of the paper barrier. Hence, UP's actions are causing a violation of 49 U.S.C. § 11101.

3. The claims of Ameren Missouri and MCRR are not barred by laches or any statute of limitations

UP contends that the claims of Ameren Missouri and MCRR are barred by laches and an unspecified statute of limitations.[50] UP Answer Defense ¶ 5. No such time bar protects the paper barrier for numerous reasons. First, Ameren Missouri and MCRR have filed not just a Complaint, but also a Petition for Revocation of the relevant transaction exemptions. A petition to revoke an exemption for a transaction may be filed at any time. 49 C.F.R. § 1121.4(f). Second, the Board specifically stated in Review of Rail Access III that shippers could challenge "existing" interchange commitments, and the Board placed no time limitation on such challenges. Review of Rail Access III, slip op. at 16. Third, to the extent that UP relies upon 49 U.S.C. § 11705 as the alleged limitation on the claims of Ameren Missouri and MCRR, this statute is inapplicable. None of the sub-sections of § 11705 apply. Ameren/MCRR are not seeking charges for transportation or return of overcharges, so (a), (b), and (d) do not apply. Ameren/MCRR are not seeking damages, so (c) does not apply. Finally, Ameren/MCRR are not seeking to enforce a prior Board order via civil action, and Ameren/MCRR are not the U.S. Government. Therefore, (e) and (f) do not apply.

Even assuming that there is some statute of limitations asserted by UP, each day that UP defends the paper barrier is a new violation, so the claims of Ameren Missouri and MCRR repeatedly accrue. Cf. Groome, slip op. at 8. Moreover, the "right to engage in ongoing anticompetitive conduct should not ordinarily be acquired by prescription." Phillip E. Areeda Herbert Hovenkamp, Antitrust Law, Volume II § 320g (3d ed. 2007).

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[50] Ameren/MCRR asked UP in discovery for a citation to the statute of limitations that UP intended to assert and UP refused to answer. See UP Response to Ameren/MCRR Interrogatory No. 14, attached as Ex. 43.

VII. CONCLUSION AND RELIEF REQUESTED

As demonstrated in this Opening Evidence, the Labadie paper barrier causes a violation of the common carrier obligation, is contrary to the public interest and the national rail transportation policy, and flouts basic antitrust principles. Consequently, the Board should declare the paper barrier provisions in the Line Sale Contract (found largely in Section 3(a)) and the Trackage Rights Agreement (found largely in Section 3(iv) and Section 1.8 of Ex. B - General Conditions) to be void and unenforceable as a matter of law. Alternatively and/or in addition, the Board should use its authority under 49 U.S.C. § 10502 to partially revoke the exemptions granted in STB Finance Docket Nos. 33508 and 33537 to the extent that the exemptions cover the paper barrier provisions of the Line Sale Contract and the included Trackage Rights Agreement. The Board should order all relief necessary to allow MCRR to use its own track and its rights under the Trackage Rights Agreement to serve Labadie.[51] The Board should order that MCRR can effectively step into the shoes of the former SP service to Labadie, with all rights of access that SP had to the Terminal Railroad Association of St. Louis and all

[51] Given the preexisting relationship between MCRR and Central Midland, MCRR may desire to contract with Central Midland to provide the desired Labadie rail service. Ameren and MCRR understand that Central Midland has a lease with UP for use of the UP track from Vigus (milepost 19.0) and Rock Island Junction (milepost 10.3). Central Midland Ry. – Lease and Operation Exemption - Union Pac. R.R., F.D. 34308 (STB served Jan. 27, 2003). While MCRR's rights under the Trackage Rights Agreement mean that the Central Midland-UP lease should not be implicated by any of the service described above, Ameren and MCRR reserve the right to challenge any portions of the Central Midland-UP lease that UP may attempt to use to impede service to Labadie. [[

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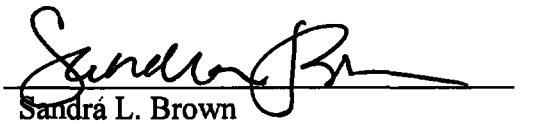
rights under any agreements addressing rail operations in the St. Louis area. The Board should order all other relief that the Board may deem just and proper.

Respectfully submitted,



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April 18, 2011

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on April 18, 2011 on the parties listed below via e-mail and hand delivery.

Michael L. Rosenthal
Covington & Burling LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004

Counsel for Union Pacific Railroad Company

David E. Benz

VERIFIED STATEMENT
JEFFREY S. JONES

VERIFIED STATEMENT

OF

JEFFREY S. JONES

My name is Jeffrey S. Jones. I am currently the Managing Executive Coal Transportation and Administration for Ameren Missouri. My business address is 1901 Chouteau Avenue, St. Louis, Missouri 63103. I have worked in my present position for approximately 5 years. (This work was in the capacity of working for Ameren Energy Fuels and Services which had exclusive agency for procurement for Ameren Missouri, and since January 1, 2011, as a direct employee of Ameren Missouri). I have worked in the Ameren family of companies for approximately 12 years. I previously worked for other utilities in the fuels and engineering services since 1990.

Ameren Missouri is a subsidiary of the Ameren Corporation which, through its operating subsidiaries, provides electricity to approximately 2.4 million customers in Missouri and Illinois. Ameren Missouri owns and operates the coal-fired Labadie electric generating station in Franklin County, Missouri. As Missouri's largest utility, Ameren Missouri provides electricity to approximately 1.2 million customers in central and eastern Missouri.

Labadie is Ameren Missouri's largest power plant and burns in excess of 10 million tons of Powder River Basin ("PRB") coal annually. PRB coal (which comes from Wyoming) is the current source for Labadie's coal. When constructed, Labadie was at the intersection of lines of the Missouri Pacific Railroad ("MP") and the Chicago, Rock Island, and Pacific Railroad ("Rock Island"). As the Board is aware, MP was acquired by Union Pacific Railroad ("UP") and the Rock Island was acquired by Southern Pacific ("SP").

The Labadie plant began operations in 1970, has a capacity of 2,405 megawatts, and has historically had access to more than one railroad. Having the flexibility of multiple fuel sourcing

options is extremely important to Ameren. Ameren Missouri is considering installing scrubbers at Labadie which will allow the plant to burn Illinois Basin coal in the near future. While Labadie may continue to burn PRB coal, the option to switch fully to Illinois Basin coal, obtain coal from another source, or use any combination of these three options is vital to Ameren Missouri.

The planning for and installation of scrubbers, including wet scrubbers, and other infrastructure needed to maximize fuel options and comply with environmental regulations facing utilities is a daunting and expensive endeavor which requires long lead times. The exact timing of the installation of this equipment is unknown due to uncertainty created by the court vacating the Clean Air Interstate Rules ("CAIR") in 2008, but installation is expected within the next ten years. The paper barrier restriction limits Ameren Missouri's ability to obtain truly competitive bids for coal sourcing and flexibility. This makes the planning for and decisions necessary to address scrubbers and environmental-related issues considerably more difficult for Ameren Missouri.

Ameren Missouri believes it should have the ability and option to use the MCRR line for its coal (regardless of coal origin) and other transportation needs. Removal of the paper barrier and restoration of the rights that SP had to interchange coal traffic in St. Louis would return Labadie to the status quo prior to UP's involvement with the line and ensure that Labadie's unrestricted and unimpeded fuel options are restored.

While Ameren Missouri was able to obtain access to BNSF via its Petition for Clarification at the STB in 2000, the BNSF trackage rights are not providing the full benefit of competition to Labadie, particularly with respect to non-PRB coal options. Ameren Missouri has only received a handful of coal trains via BNSF transportation since the Board clarified the

applicability of the Settlement Agreement to Labadie. Ameren Missouri now believes that it must obtain elimination of the paper barrier in order to restore MCRR with the same rights that SP would have had with respect to the line prior to the UP/SP merger and MCRR sale.

Nevertheless, BNSF's current access via trackage rights for PRB coal should be maintained because (1) Ameren Missouri has already paid to establish that access through both the separate legal proceeding required to obtain Decision No. 89 and the [[ ]] Ameren Missouri paid for rail infrastructure improvements on BNSF and UP; and (2) it was UP's own actions which created an additional option for rail service to Labadie by UP selling the former Rock Island line to a third party (MCRR).

Ameren Missouri believes that transportation rate level is not a direct issue in deciding the unlawfulness of the Labadie paper barrier and the real issue is the opportunity and option for competition. However, Ameren Missouri believes that an example of the lack of incentive to competitively bid for non-PRB coal by one of the western carriers is illuminating. For example, in October 2007, Ameren requested a bid from BNSF for PRB and Illinois Basin coal to Ameren's Sioux (Machens destination) and Rush Island (Rush Tower destination) plants. BNSF's confidential offer shows that [[

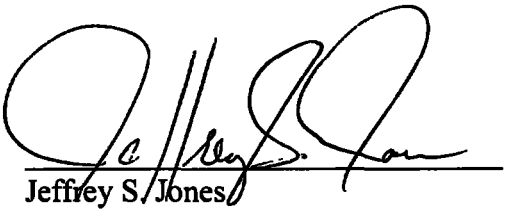
]] See Ex. 45.

In summary, Ameren Missouri believes it should have the ability and option to use the MCRR line for its coal (regardless of coal origin) and other transportation needs. Removal of the paper barrier and restoration of the rights that SP had to interchange coal traffic in St. Louis is vital to Ameren Missouri's fuel flexibility.

VERIFICATION

I Jeffrey S. Jones, pursuant to 49 CFR § 1104.5 verify under penalty of perjury that the foregoing is true and correct based upon my information and belief. Further I certify that I am qualified and authorized to file this Verified Statement submitted as part of this Opening Evidence.

Executed on April 18, 2011



Jeffrey S. Jones
Managing Executive Coal Transportation and Administration
Ameren Missouri

VERIFIED STATEMENT
ROBERT K. NEFF

VERIFIED STATEMENT

OF

ROBERT K. NEFF

My name is Robert K. Neff. I am currently the Director, Coal Supply, for Union Electric Company d/b/a/ UE (referred to herein as "UE"). My business address is 1901 Chouteau Avenue, St. Louis, Missouri 63103. I have worked in my present position for approximately 10 years; up until this year, I was employed by Ameren Energy Fuels and Services Company which provided fuel and fuel transportation services to all of Ameren Corporation' coal generation subsidiaries ("Ameren"). Overall, I have been in the fuel transportation area with the entire Ameren family of companies for 25 years. I have also been the President of the Missouri Central Railroad ("MCRR") since October 21, 1999. Since 1971 I have had various rail related jobs. For four years during college, I worked part time at the Missouri Pacific Railroad ("MP"). I then worked three more years full time at MP. During that time I had various jobs in the mechanical, maintenance of way and operating departments. After leaving MP and before joining Ameren, I worked at American Car and Foundry, a freight car builder company.

UE and its affiliates have been active in trying to improve rail service and rates at its plants by creating competitive transportation alternatives. Ameren, via its partially-owned subsidiary, Electric Energy, Inc., completed its first rail build-out in 1990 with the Joppa and Eastern Railroad Company to the Joppa Plant in Illinois. With the 2006 STB approval for the construction of the Coffeen and Western Railroad Company's build-out from Ameren's Coffeen Power Plant, Ameren made an important move toward completing its objective of obtaining multiple transportation alternatives at all of its coal-fired plants, via various methods.

UE supports self-help measures and shipper investments in the rail transportation infrastructure to assist in fostering alternative opportunities for fuel and transportation. However, as Ameren expressed recently in comments filed in STB Ex Parte 705, Competition in the Railroad Industry, since 2004 the competitive environment among the western railroads has evaporated and the incentive for shipper self-help has been stifled. We see the creation of paper barriers in general, and specifically, the continued enforcement of the Labadie paper barrier as one of the ways that rail competition is stifled.

There is a long history of coal deliveries to Labadie using both tracks that reach the plant. Even before Labadie was operational, UE built a 330-foot industry track in or shortly after 1967 to facilitate Rock Island railroad service. See Ex. 14. The paper barrier prevents UE from making use of this private track for coal deliveries that it built with its own funds. Prior to its demise, the Rock Island delivered coal to Labadie. See Ex. 15 (which is a photo of the Rock Island delivering coal to Labadie, date unknown).

After purchasing the Rock Island, Southern Pacific ("SP") delivered 2.7 million tons of coal to Labadie during the 1990's using the former Rock Island line, prior to the creation of the paper barrier, from Colorado and Illinois origins. See Ex. 8 and 16. UE invested several millions of dollars in the form of a [[ ]] infrastructure improvements on the former Rock Island line between St. Louis and Labadie to aid SP service to Labadie, and SP did indeed deliver coal to Labadie on the former Rock Island line between 1990 and 1995. See Ex. 16. Meanwhile, the other private track to Labadie plant connecting to the MP (now owned by the Union Pacific Railroad Company ("UP")) was also historically used for transportation of coal to Labadie, and still is today.

As the Board is aware, in 2000, Ameren was forced to petition the Board for clarification of the UP/SP merger conditions to have Ameren declared a "2-to-1" shipper entitled to certain merger protections.[1] Union Pac. Corp. – Control and Merger – Southern Pac. Corp., 4 S.T.B. 879, 881 (2000). As a result of the Board's decision in UP/SP, Labadie received access to BNSF via the UP/SP merger condition known as the "omnibus" clause that attempted to replicate SP's service on the St. Louis to Labadie section of the former SP line. This access was received by BNSF via trackage rights over the UP from their interconnection at Pacific, Missouri. UE invested approximately $4.7 million for construction of a crossover at Pacific, MO, where the UP and BNSF lines meet in order to facilitate implementation of the Settlement Agreement and, eventually, BNSF rail service to Labadie.[2]

MCRR is a Class III railroad common carrier and owns the former Rock Island line across Missouri between milepost 19.0 at Vigus, Missouri in the east to milepost 263.5 at Pleasant Hill, Missouri in the west. See Map at Ex. 1. MCRR is wholly-owned by Ameren Development Company, a subsidiary of the Ameren. MCRR would like to, and has the common carrier obligation to, provide rail transportation to the Labadie facility which is a shipper located directly on MCRR's tracks.

MCRR purchased its rail line from UP by way of GRC Holdings Corporation ("GRC") in a transaction that closed in 1999. See generally Missouri Central Railroad Company –

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[1] Since the history of the "2-to-1" treatment of Labadie has already been considered by the Board, I will not repeat it here, but I understand that the Verified Statements of William B. McNally and Udo A. Heinze that were submitted as part of the Petition for Clarification are being including as Exhibits to the Opening Statement. See Ex. 9 and 10. Mr. McNally and Mr. Heinze are no longer employed by any Ameren entity.

[2] After the STB's decision on Labadie's "2-to-1" status, UP inquired into whether BNSF would provide service to Labadie over the MCRR. MCRR declined because of the time and cost that the rehabilitation would have taken at that time.

Acquisition and Operation Exemption – Lines of Union Pacific Railroad Company, STB Docket No. 33508, and GRC Holdings Corporation – Acquisition Exemption – Union Pacific Railroad Company, STB Docket No. 33537, slip op. at 1 (served Sept. 14, 1999). In the same transaction, MCRR also acquired trackage rights from UP pursuant to an agreement between Vigus and Rock Island Junction, Missouri (milepost 10.3), and between Pleasant Hill and Leeds Junction, Missouri (milepost 288.3). With Board approval, Ameren acquired a controlling interest in MCRR in October 1999. See Ameren Corp.—Control Exemption—Missouri Cent. R.R., F. D. 33805, slip op. (STB served Nov. 5, 1999).

In my current role as President of MCRR, I learned that on March 13, 1996, one day prior to UE signing the Conceptual Framework related to the UP/SP merger, UP representatives met with GRC and MCRR[3] representatives to discuss selling the Rock Island line to MCRR. At that meeting, John Rebensdorf of UP insisted that MCRR would not be able to serve the Labadie Plant. A term sheet was drafted by Mike Hemmer (who I understand was outside counsel for UP at the time) shortly thereafter which provided that service to Labadie was prohibited. Following negotiations and drafting of documents on November 3, 1997, GRC and UP entered into a Line Sale Contract for most of the Rock Island line between St. Louis and Kansas City, as well as a Trackage Rights Agreement, both of which contained a number of restrictions against service to Labadie plant.

Closing on the transaction between UP and GRC/MCRR was to occur November 10, 1997.[4] The months passed with no closing because, as Ameren Missouri would later learn, GRC and MCRR were unable to raise the necessary funds to complete the purchase. GRC first

[3] This meeting took place several years before Ameren became involved in the MCRR and, therefore, several years before I became MCRR President.
[4] See Line Sale Contract § 2.

approached UE on July 1, 1998 to inquire about UE's interest in financing the GRC acquisition of the line. UE declined at that time. A few months later, UP issued a press release on February 12, 1999 announcing the collapse of the long-planned sale of the rail line to GRC. See Ex. 18.

On February 17, 1999, GRC contacted Ameren Missouri to inquire whether Ameren would be interested in financing the purchase of the former Rock Island line. Ameren was hesitant to be the financier of the line because Ameren was not interested in owning a large railroad. Nevertheless, Ameren Missouri was also apprehensive about the collapse of the proposed sale to GRC and MCRR because of the concern that UP might revive SP's prior plan to abandon most or all of the line. UE also understood at the time that GRC only had 45 days to cure a breach. In addition, the rail line travels through Ameren Missouri's service territory and Ameren was concerned about the effect on economic development of any potential loss of rail service to the area and the potential impact to Labadie because the "2-to-1" status of Labadie was unsettled at that time. In particular, Ameren Missouri wanted to ensure that existing and future businesses continued to have the option of rail service on the line, and Ameren Missouri also wanted to preserve the second physical rail access to the Labadie plant.

In March 1999, Ameren negotiated a Shareholder Agreement, a Stock Purchase Agreement, and a Management Agreement with GRC that would govern the financing of the purchase of the MCRR line.[5] See Ex. 20, 21, 22. Under these agreements, Ameren would [[

[5] In March 1999, the STB also denied WCTL's renewed petition to look at paper barriers in Ex Parte 575 which added to the uncertainty about the Board's resolve to address the anticompetitive paper barriers. In fact, the uncertainty surrounding the Board's willingness to address or remove paper barriers along with the significant cost and risk associated with challenging a railroad paper barrier, discouraged the formal challenge of the Labadie paper barrier. The filing fee alone for this Complaint was $20,600 at that time.

]] See Ex.21. [[

]] because the transaction did not close as planned and Ameren Missouri understood that UP reiterated its earlier statement that the deal was terminated.

We also learned that GRC and MCRR had commenced a lawsuit against UP as a means to force the transaction to go forward. In the intervening months, GRC continued its attempts to persuade Ameren Missouri to invest in the MCRR acquisition and explain how GRC thought that traffic could be expanded on the MCRR. See Ex. 27. The months continued to pass with no transaction and no resolution to the lawsuit. As the danger of an abandonment of the line loomed, GRC approached UE again in August 1999 to ask for financial assistance in funding the acquisition.

Ameren wanted to assure that the long term rail options for this line would not be unnecessarily cut short. Therefore, Ameren agreed to come in as the eleventh-hour financier. I assure the Board that Ameren had no role in the negotiation or drafting the contents of the Line Sale Contract or the Trackage Rights Agreement. The deal terms had been reached long before UE was approached by GRC. As noted above, UP stated in February 1999 that the deal was off, litigation was pending and the preservation of the line was in jeopardy.

The crux of the problem is that the Labadie paper barrier unreasonably restricts UE's opportunity and options for coal sourcing outside of the Powder River Basin ("PRB") and MCRR's opportunity to earn revenues. Both UP and BNSF serve the PRB and assuming for the sake of argument that UP and BNSF have the same economic interest to compete for the

movement of coal to Labadie,[6] they clearly do not have the same incentive to move Illinois basin coal. Based on the collective experience of the operating companies of Ameren at other plants with scrubbers installed, it is quite possible that coal from the Illinois Basin would be more competitively priced on a delivered basis than Powder River Basin coal under the right competitive environment.

Recent extreme rail rate increases by the two western carriers experienced by PRB coal shippers [[ ]][7] have made other coal basins, such as the Illinois Basin, a more attractive option, especially to utilities in close proximity such as UE. However, allowing the illegal and anticompetitive paper barrier on MCRR to continue will effectively prevent UE from accessing the lower cost Illinois Basin coal. Of the existing two carriers serving Labadie over the UP tracks, BNSF has no access to mines in the Illinois Basin. Furthermore, neither BNSF nor UP have an incentive to quote competitive rates to counter its more lucrative PRB movements.[8] MCRR has direct access to CSX, NS and CN through the

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[6] In making this assumption, UE does not concede that UP and BNSF do in fact compete for PRB traffic. As the Board is likely aware, there are examples in the industry that seem to indicate that UP and BNSF may in fact not be fully competing in the PRB market. Even with the rights that Ameren fought for and paid for with the connecting track at Pacific, BNSF has moved limited amounts of coal to Labadie and the incumbent carrier, UP, has retained the business at prices that continue to climb by significant increments notwithstanding the dual PRB access to Labadie. See Comments of Ameren Corporation recently filed in STB Ex Parte No. 705, Competition in the Railroad Industry.

[7] For a historical rate chart showing these rail rate increases for shipments of PRB coal to competitively served destinations on BNSF or UP, see Ex. 44.

[8] The Labadie paper barrier also does not fall into the case cited by the STB in Ex Parte 575 whereby a shipper aggrieved by a paper barrier that protects a railroad's long haul could petition the Board for rate relief. UE cannot seek such rate relief for Labadie because it is was not and would not be captive to UP. Ex Parte 575 at 9. Moreover, UP cannot claim that the removal of the Labadie paper barrier would harm it by making it subject to rate relief claims by UE at the Board since Labadie could not challenge any UP quoted rate for the non-MCRR portion of the movement even if MCRR was legally permitted to give UE a contract for that portion of the movement since Labadie was not and would not be captive to UP.

TRRA in St. Louis, none of which serve the PRB and, therefore, could promote competitive Illinois Basin coal rates to Labadie, something neither western carrier has shown any inclination to do at other Ameren locations. SP in the past moved Illinois Basin coal to Labadie which neither UP nor BNSF have demonstrated incentive or desire to move. See the Verified Statement of Jeffrey S. Jones for more discussion on fuel flexibility and options that are vital to UE.

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See Ex. 35. Rail operations on MCRR are now provided by Central Midland Railway Company ("Central Midland") pursuant to a lease with MCRR. Pursuant to the terms of the lease between MCRR and Central Midland,[9] [[

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Since UE and MCRR are affiliates, we have not engaged in the futile attempt to paper a formal reasonable request for service. Nevertheless, UE would like for the Labadie plant to be able to receive service from MCRR and as President of MCRR, MCRR would like to provide

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[9] MCRR and Central Midland Railway Company recently filed to abandon and discontinue service on 5.6 miles of MCRR (approximately 25 miles from the connection to the Kansas City Terminal Railway) between mileposts 257.283 (near Wingate) and 262.906 (near Pleasant Hill). See Missouri Central R.R. –Abandonment and Discontinuance Exemption – in Cass County, Missouri, F.D. AB-1068X, and Central Midland Ry. –Discontinuance of Service and Operating Rights Exemption – in Cass County, Missouri, F.D. AB-1070X. In light of this development, Ameren Missouri and MCRR are not specifically seeking relief on the Kansas City side at this time; however, the legal basis is the same.

rail service to Labadie, and would specifically like the ability to bid for the purpose of transporting coal to Labadie, but the paper barrier prevents MCRR from doing so.

VERIFICATION

I Robert K. Neff, pursuant to 49 CFR § 1104.5 verify under penalty of perjury that the foregoing is true and correct based upon my information and belief. Further I certify that I am qualified and authorized to file this Verified Statement submitted as part of this Opening Evidence.

Executed on 4/15/11.

Robert K. Neff
President
Missouri Central Railroad Company

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI and MISSOURI CENTRAL RAILROAD COMPANY,	)	
Complainants,	)	
v.	)	**Docket No. 42126**
UNION PACIFIC RAILROAD COMPANY,	)	
Defendant.	)	
MISSOURI CENTRAL RAILROAD COMPANY – ACQUISITION AND OPERATION EXEMPTION – LINES OF UNION PACIFIC RAILROAD COMPANY	)	**Finance Docket No. 33508**
and	)	
GRC HOLDINGS CORPORATION – ACQUISITION EXEMPTION – LINES OF UNION PACIFIC RAILROAD COMPANY	)	**Finance Docket No. 33537**

OPENING EVIDENCE

Volume II OF II
(EXHIBITS)

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Attorneys for Ameren Missouri and Missouri Central Railroad Company

April 18, 2011

LIST OF EXHIBITS

EXHIBIT	DESCRIPTION
1	Map showing railroad connections to Labadie Plant – current
2	Map showing railroad connections to Labadie Plant – pre MCRR sale
3	Letter from F. James Sensenbrenner, Jr. (U.S. House of Representatives) to R. Hewitt Pate (Department of Justice), July 15, 2004
4	Letter from William E. Moschella (Department of Justice) to F. James Sensenbrenner, Jr. (U.S. House of Representatives), Sept. 27, 2004
5	Railroad Access and Competition Issues, Congressional Research Service (Jan. 10, 2008)
6	**REDACTED**
7	**REDACTED**
8	**REDACTED**
9	**REDACTED**
10	**REDACTED**
11	**REDACTED**
12	**REDACTED**
13	**REDACTED**
14	**REDACTED**
15	Photograph showing Chicago, Rock Island and Pacific RR coal train at Labadie
16	**REDACTED**
17	**REDACTED**
18	**REDACTED**
19	**REDACTED**
20	**REDACTED**

21	**REDACTED**
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33	**REDACTED**
34	**REDACTED**
35	**REDACTED**
36	**REDACTED**
37	**REDACTED**
38	UP and SP Press Releases (Aug. 3, 1995)
39	UP News Release (Sept. 26, 1995)
40	Darren Bush, "The Intersection of Competition Policy and Surface Transportation Regulatory Policy: An Examination of H.R. 1650, the 'Railroad Antitrust Enforcement Act of 2007,' " testimony before the House Judiciary Committee Antitrust Task Force, U.S. Congress (Feb. 25, 2008)
41	Competitive Impact Statement, filed by DOJ on Sept. 2, 2005 in United States of America v. Ecast, Inc. and NSM Music Group, LTD. Civil Action No. 05-1754 (CKK)
42	United States of America v. Ecast, Inc. and NSM Music Group, LTD., Civil

Action No. 05-1754 (CKK) (Final Judgment issued Dec. 16, 2005)

43 UP Objections and Responses to Ameren Missouri and MCRR's First Set of Discovery Requests (Jan. 28, 2011)

44 **REDACTED**

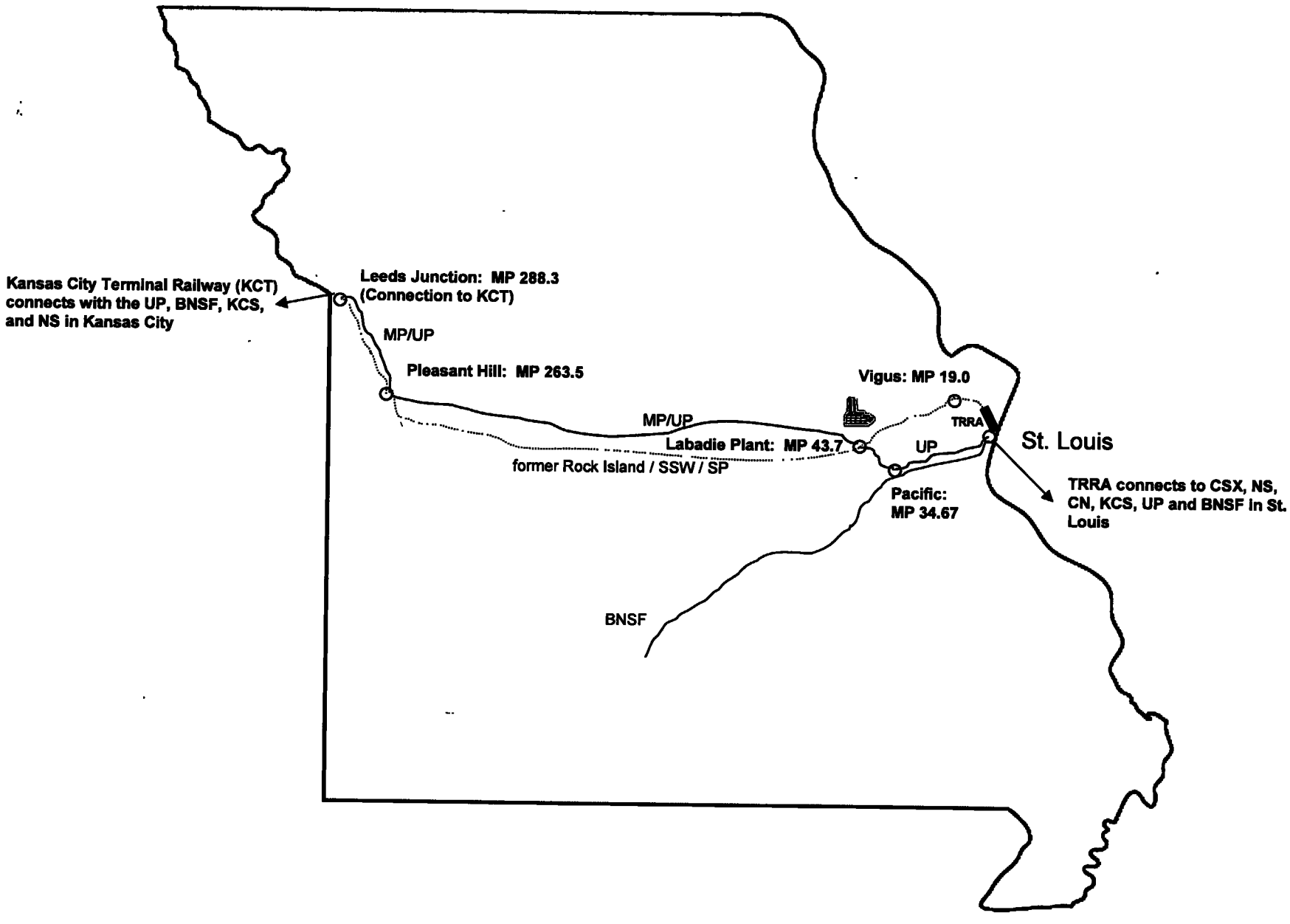
45 **REDACTED**

46 **REDACTED**

Exhibit 1

Map Showing Railroad Connections to Labadie Plant – pre MCRR Sale

(Not to Scale)



Map Showing Railroad Connections to Labadie Plant

(Not to Scale)

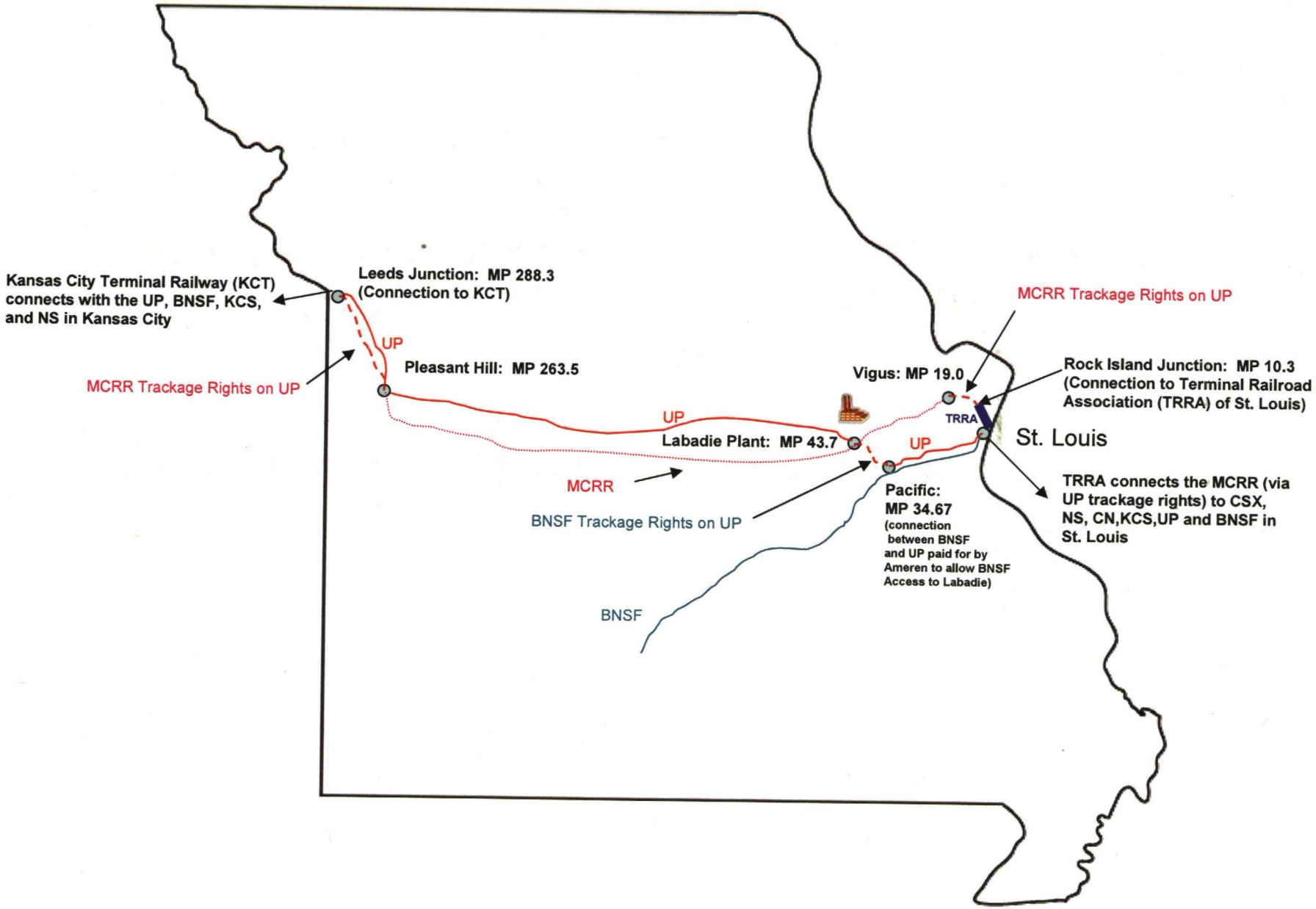


Exhibit 2

Map Showing Railroad Connections to Labadie Plant – pre MCRR Sale

(Not to Scale)

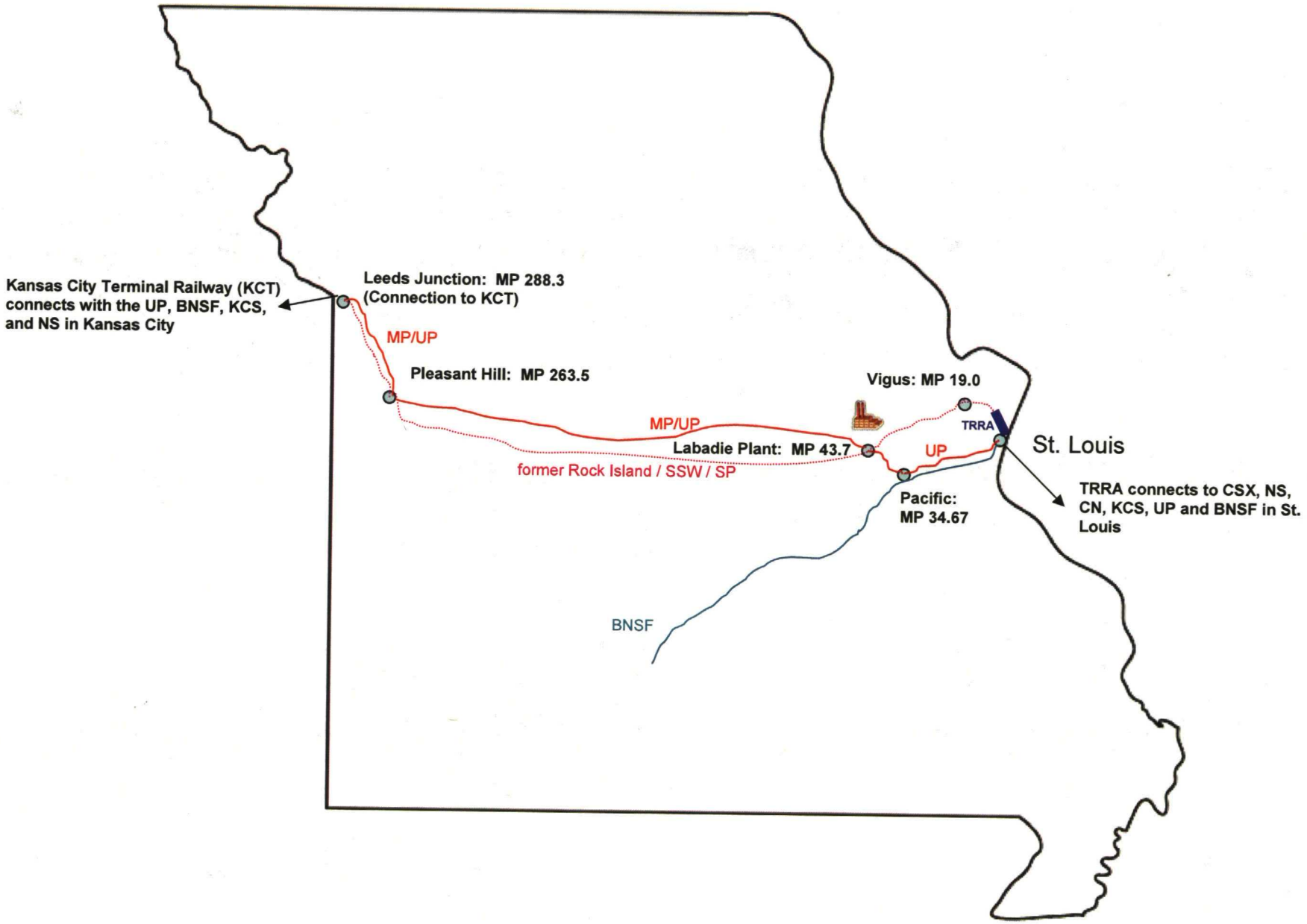


Exhibit 3

ONE HUNDRED EIGHTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

July 15, 2004

The Honorable R. Hewitt Pate
Assistant Attorney General
Antitrust Division
Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Assistant Attorney General:

I write to request that the Department of Justice Antitrust Division provide the Committee with its assessment and views on issues involving the application of the antitrust laws in the railroad transportation industry, and, more generally, on railroad competition policy.

United States railroads currently enjoy limited antitrust immunity. It is not clear that this immunity from antitrust actions serves the public interest in this marketplace. Some of these antitrust exemptions were established over eight decades ago, when competitive conditions in this marketplace were fundamentally different.

For example:

- Railroads are generally exempt from Sherman Act antitrust actions for treble damages if common carrier rates "approved by the [government]" are involved. This exemption is based upon notions of inherent conflict between a pervasive regime of rate regulation and published rates – a regime which no longer exists in the largely deregulated environment in which railroads presently operate. *See* Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156 (1922); Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986).

- Railroads are generally exempt from private antitrust actions "for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49." *See* 15 U.S.C. § 26 et. seq.

- Persons participating in approved or exempted railroad consolidation, merger, and acquisition of control are "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction . . .". *See* 49 U.S.C. § 11321(a).

To the extent that exemptions from the antitrust laws unfairly shield competitors from competition, these exemptions require scrutiny and reconsideration as conditions warrant. This scrutiny is especially justified given the highly concentrated nature of the railroad industry. After years of industry consolidation, only two major carriers in the West and two major carriers in the East remain in this marketplace. In addition, many individuals, communities, and regions are served by only one railroad carrier.

Additionally, railroad customers have raised a number of concerns toward a range of industry practices that have allegedly suppressed competition in this marketplace. These practices include refusals by railroads to establish common carrier rates on individual "bottleneck" rail segments and corresponding demands that service be provided only on full-through rail routes. This practice produces anticompetitive harm by preventing customers from enjoying the benefits of carrier competition on rail segments in which at least two carriers compete. Another troubling allegation concerns Class I railroads imposing "paper barriers" after spinning off lower density lines to short-line railroads and subsequently preventing these carriers from handling business in conjunction with other railroads that would otherwise be eligible to provide competitive service. Additionally, concerns have been expressed that both of the major western Class I railroads are now attempting to publicly price major portions of their bulk commodity services in a manner that could raise anticompetitive concerns.

I relay these concerns, not because I seek to substantiate them as indicators of anticompetitive conduct in this marketplace, but rather, because they indicate that additional investigation into industry competitive practices may be warranted. Additionally, these concerns may highlight the need to revisit existing law and regulatory policies to more forcefully promote effective intramodal competition in the transportation marketplace. They may also indicate that investigation by the Department of Justice into such practices may be appropriate.

Given the special expertise of the Antitrust Division and its authority to investigate issues of competitive conduct in the railroad transportation industry, the Committee would benefit from receiving the written views of the Division on this matter.

I thus request an assessment of those concerns raised above. I appreciate your willingness to provide the Committee with this information, and request that you respond to this request no later than August 27, 2004.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

FJS/Jud.

Exhibit 4

Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

September 27, 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Sensenbrenner:

This responds to your letter of July 15, 2004, to the Department of Justice regarding the application of the antitrust laws in the railroad industry. You note that the various statutory antitrust exemptions for railroad industry activities were enacted many decades ago, and you question whether continuing this antitrust immunity serves the public interest. The Department appreciates having the benefit of your perspective on this important issue of competition policy.

The antitrust laws are the chief legal protector of the free-market principles on which the American economy is based. Experience has shown that competition among businesses, each attempting to be successful in selling its products and services, leads to better-quality products and services, lower prices, and higher levels of innovation. The antitrust laws ensure that businesses will not stifle this competition to the detriment of consumers. Accordingly, the Department has historically opposed efforts to create sector-specific exemptions to the antitrust laws. The Department believes such exemptions can be justified only in rare instances, when the fundamental free-market values underlying the antitrust laws are compellingly outweighed by a clearly paramount and clearly incompatible public policy objective.

In the first decades of the past century, for example, Congress enacted antitrust exemptions in industries in which it believed normal free-market competition to be unworkable. These industries included the railroad, airline, trucking, and telephone industries. In lieu of competition protected by the antitrust laws, Congress established comprehensive regulatory regimes that regulated prices, service offerings, and market entry as well as other aspects of these industries. These regulatory regimes often included statutory antitrust exemptions for conduct approved by the regulatory agency. And if the regulatory regime was sufficiently pervasive, the courts could hold that it had implicitly displaced private damages recovery under the antitrust laws. *See* Keogh v. Chicago Northwestern Railway, 260 U.S. 156 (1922); Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409 (1986).

In the last decades of the past century, policymakers began to reconsider whether competition was truly unworkable in these industries, and efforts were undertaken to replace

market regulation with competition where possible. As these industries became deregulated, antitrust exemptions no longer made sense. In the case of airlines, for example, the antitrust exemption for mergers approved by the Civil Aeronautics Board was repealed and, after a transition period, merger enforcement in the airline industry reverted to the Department of Justice under the antitrust laws.

In 1995, when Congress abolished the Interstate Commerce Commission and created the Surface Transportation Board to retain some of the ICC's old regulatory authority, the Department urged Congress to turn over review of railroad mergers to the antitrust enforcement agencies, as it had done with airlines. *See* Statement of Steven C. Sunshine, Deputy Assistant Attorney General, Antitrust Division, Before the House Transportation Subcommittee on Railroads, January 26, 1995 (attached). Congress opted instead to leave that responsibility with the Surface Transportation Board, with an accompanying antitrust exemption, with the Justice Department limited to an advisory role before the Surface Transportation Board. *See* 49 U.S.C. § 11321(a).

Your letter also describes three specific practices in the railroad industry about which concerns have been raised about possible anticompetitive effects.

The first practice is the refusal by a railroad that controls one segment of a freight movement to quote rates separately for that "bottleneck" segment, instead quoting rates only for the entire freight movement. You note that this practice denies shippers the benefits of competition on segments of the move where an alternative carrier might compete for the business. Because of the Surface Transportation Board's involvement in approving these rates, and its acceptance of this practice, relief may not be available under the antitrust laws. If this practice were subject to the antitrust laws, it could be evaluated as a refusal to deal in possible violation of section 2 of the Sherman Act, or as a tying arrangement in possible violation of section 1 of the Sherman Act. Whether it would constitute an antitrust violation would depend on the particular facts.

The second industry practice you describe is "paper barriers." Paper barriers are created when Class I railroads spin off segments of their trackage to short-line or low-density carriers with contractual terms that prohibit the acquiring carriers from competing with the Class I railroads for business. Since these contractual terms are part of an underlying sale transaction that is reviewed and approved by the Surface Transportation Board, they may be exempted from the reach of the antitrust laws, depending on the scope of the approval language in each of the Board's relevant orders. If paper barriers were subject to the antitrust laws, they would be evaluated under section 1 of the Sherman Act. The Department would examine whether the restraint is ancillary to the sale of the trackage – i.e., whether the restraint is reasonably necessary to achieve the pro-competitive benefits of the sale.

The third industry practice you describe is the practice by both of the major western Class I railroads of publicly disclosing tentative prospective shipping rate offerings. Under the antitrust laws, the public disclosure of pricing information among competitors can, under some circumstances, facilitate collusion and result in increased prices, in violation of section 1 of the Sherman Act. *See, e.g.*, United States v. Airline Tariff Publishing Co., 1994 Trade Cas. (CCH) ¶ 70,687 (D.D.C. 1994). Publicly announcing prospective rates outside the confines of a rate approval proceeding at the Surface Transportation Board is likely to be subject to review under the antitrust laws. If you know of anyone who has information that you believe might be useful for evaluating this practice under the antitrust laws, please encourage them to contact the Antitrust Division.

Thank you for bringing your interest in these issues to our attention, and for soliciting our views as you consider these issues. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosure

DEPARTMENT OF JUSTICE

STATEMENT OF

STEVEN C. SUNSHINE
DEPUTY ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE
SUBCOMMITTEE ON RAILROADS
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

CONCERNING COMPETITIVE REVIEW OF RAILROAD MERGERS AFTER ICC SUNSET
ON
JANUARY 26, 1995

Madam Chairwoman and Members of the Subcommittee: I very much appreciate this opportunity to appear before you today to explain how the Department of Justice would review railroad mergers and acquisitions if the Interstate Commerce Commission's authority to review and approve those transactions is repealed. The Department of Justice believes that railroad mergers and acquisitions should be reviewed under the same legal standards that apply to virtually every other sector of our nation's economy. We believe that the antitrust approach would provide significant advantages, saving time and scarce federal resources and reducing burden and delay on the merging parties, while still protecting the public interest by preventing anticompetitive mergers.

For most of our economy, Congress has chosen to rely on market competition rather than government regulation to protect consumers and the public interest. Not only does competition best allocate scarce goods and services to those who value them most highly, it also forces firms to become as efficient as possible. Consumers benefit where competition is vibrant -- it provides the highest possible quality of goods and services at the lowest possible cost. The antitrust laws protect competition by prohibiting unreasonable restraints of trade, including mergers that threaten substantially to lessen competition.

A number of important industries have in recent years been largely freed from economic regulation, including trucking, airlines, and natural gas production. Building on earlier regulatory and legislative efforts, the

Staggers Rail Act of 1980 substantially deregulated the freight rail industry by placing more reliance on market forces. The Staggers Act is widely credited with revitalizing freight railroads, many of which were in precarious financial condition. The next logical step to deregulate further the rail industry would be to eliminate prior government review and approval of mergers under the "public interest" standard that is currently embodied in the Interstate Commerce Act.

Under the Interstate Commerce Act (ICA), rail carrier mergers must receive prior government approval under a broad "public interest" standard before they are permitted to occur. If a merger transaction involves two class I railroads, the ICC may not approve it unless and until the Commission determines that the transaction is, on balance, "consistent with the public interest."(1)

The ICA directs the Commission to consider competition, but only as one of five factors to balance in assessing the public interest: the effect of the proposed transaction on the adequacy of transportation to the public; the effect on the public interest of including, or failing to include, other rail carriers in the proposed transaction; the total fixed charges that would result from the proposed transaction; the interest of carrier employees affected by the proposed transaction; and whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.(2)

The ICA contemplates intervention in the process by competitors and other interested parties, and provides for lengthy time periods for the Commission to conduct evidentiary hearings and issue its determinations. It can take the Commission up to two to three years to render its decisions on mergers having significant competition issues. Even a rail merger that raises few competitive concerns can be under review at the ICC for a year or more. For example, the ICC recently completed its review of the proposal by the Union Pacific for authority to take control of the Chicago & North Western. Union Pacific filed its application on January 29, 1993; the ICC approved the transaction in December 1994. There was extensive participation by competitors -- competitors who were perhaps more concerned with their own private interests than with the merger's likely impact on rail customers.

A more dramatic example of the time that ICC proceedings can take was the Santa Fe's proposal to take control of the Southern Pacific, which the Department opposed at the Commission. Those railroads first notified the ICC about their proposed combination on November 22, 1983. The ICC's ultimate decision, which disapproved the transaction, was not made until almost 3 years later, on October 10, 1986. Then, close to 2 more years passed before the ICC ordered Santa Fe to divest the Southern Pacific stock, which the ICC had allowed Santa Fe to hold in a voting trust.

The ICA's public interest standard as applied in ICC railroad merger

proceedings has led to the negotiation of many protective and other conditions that caused the merged carrier to make concessions to protesting parties, which often include its principal competitors. Such conditions can limit the potential efficiencies of a merger and protect competitors from the enhanced competition that could otherwise result from a procompetitive combination.

In contrast, merger enforcement under the antitrust laws protects competition, not competitors. Section 7 of the Clayton Act, 15 U.S.C. 18, the primary provision of the antitrust laws governing mergers and acquisitions, prohibits those transactions that threaten "substantially to lessen competition in any line of commerce in any section of the country." The central issue under the Clayton Act is whether the merger will result in increased prices to consumers or reduced services.

Merger decisions are made far more quickly under the antitrust laws than under the ICA. Under the premerger notification provisions of the Hart-Scott-Rodino ("HSR") Act,[3] routine mergers that raise no antitrust issues can be consummated upon the expiration of a 30-day waiting period (15 days for cash tender offers). When requested, the antitrust enforcement agencies will in appropriate cases agree to "early termination" of the waiting period in less than 30 days.

Where a merger does raise antitrust concerns, we are able to obtain all of the information we need to resolve those concerns expeditiously. If we need additional information from the parties to complete our investigation, we can issue a "second request" that will extend the waiting period an additional 20 days after the parties supply the requested information.[4] The Department seeks information from competitors, suppliers, customers, employees, and other knowledgeable parties in order to analyze the effects of the merger. In addition, we can seek documents, deposition testimony, and interrogatory answers from the parties and other persons pursuant to the Antitrust Civil Process Act.

When the Department determines that a proposed merger raises significant competitive issues, several steps are available to speed resolution of the matter. Most such matters are resolved in 6 months to a year. The parties can "fix-it-first" by restructuring the transaction, which avoids a legal challenge by the Department. If the investigation runs its course and the Department decides to challenge the transaction, the parties and the Department frequently negotiate a consent judgment that corrects the competitive problem but otherwise allows the remainder of the transaction to go forward.

If the Department concludes that a merger transaction as structured would violate the antitrust laws, and the parties do not wish to restructure it, the Department must go to court to prevent the transaction. The Department can seek a preliminary injunction, which prohibits the merger pending a full trial for a permanent injunction. Even if the case goes through a full trial, it

will likely be resolved less than a year after the complaint is filed, substantially less time than it usually takes the ICC to reach a final decision on a merger under the ICA. However, only a small percentage of the mergers reviewed by the Department are challenged in court.

The analytical framework we use in merger investigations is set forth in the 1992 Horizontal Merger Guidelines, issued jointly by the Department of Justice and the Federal Trade Commission. These Merger Guidelines have been cited and relied on by the courts in merger cases. Under the Merger Guidelines, we assess the merger's likely harm to competition, and consider any efficiencies that may outweigh potential harmful effects.

Our competitive analysis takes into account the position of each of the merging firms in each economically meaningful "relevant market", the relevant market's concentration, the extent to which that concentration would be increased, the competitive conditions likely to exist in the market after the transaction, and the likely ability of the resulting firm to raise prices or lower services to the detriment of consumers. We define relevant markets carefully, through an evaluation of any effective substitutes customers have for the services provided by the merging firms.

For railroad mergers, the analysis begins with identification of the affected routes. For two railroads with largely parallel routes, the logical starting point for defining a market is the carriage of a particular commodity from one point (called an origin) to a second point (called a destination) by the merging railroads.

Once the affected routes are identified, the analysis generally focuses on an evaluation of the other rail, intermodal, product, and source competition options available to shippers. Intermodal competition is the ability of a shipper to substitute another mode of transportation, usually truck or water carriage, for the shipment of a particular commodity between a particular origin and destination. If truck or water service is available and is a close substitute for rail carriage for certain commodities, these competitive alternatives would prevent a rail carrier from raising its rates for these commodities. For other commodities, however, trucks may be at a significant disadvantage to rail where, for example, the distance the commodity is shipped is great, the volume of the commodity shipped is large, or the value of the commodity as compared to its weight is small.

Other forms of competition considered include product and source competition. "Product competition" is the ability of a shipper to substitute another commodity that allows use of a transportation system other than the merged rail carrier. "Source competition" is the ability of shippers in the region of the merging railroads to avoid high rail rates by shipping a commodity to another destination or by obtaining it from another source, again using other than the merged rail carrier.

If one or more of these forms of competition is available, its existence will be reflected in the Department's definition of the markets affected by the

merger. If such competition is significant, it may defeat or limit the ability of the merged carrier to raise prices. The degree to which any of these methods of competition will be effective will vary according to the nature of the commodities, routes, and perhaps other factors, including differences in demand and/or supply elasticity for different commodities.

The antitrust laws do not prohibit efficient railroad mergers that can benefit shippers. The Merger Guidelines expressly recognize that mergers can enhance efficiency. When necessary to an evaluation of the net competitive effects of a merger, we consider the prospect that real efficiencies will be achieved that could not be realized absent the merger. Thus, the Department of Justice will challenge a merger only when its likely harm to competition is not outweighed by its likely efficiencies.

The Department has not opposed rail mergers that did not significantly threaten competition. Over the past 10 years, the Department opposed only one rail merger in its entirety -- the proposed consolidation of the Santa Fe and Southern Pacific Railroads -- a transaction the ICC ultimately disapproved. The Department raised no objection to the two rail mergers most recently approved by the ICC: Kansas City Southern's acquisition of Mid-South, and the Union Pacific's control of the Chicago & North Western.

In sum, our analysis of proposed railroad mergers using the Merger Guidelines is the same general analysis we use in reviewing mergers subject to the antitrust laws. That analysis is sophisticated, thorough, and flexible -- it involves far more than simply computing market shares or concentration figures. It takes into account all the dynamics of the markets with which we are dealing.

Subjecting railroad mergers and acquisitions to the antitrust laws would expedite both the investigation and resolution of such transactions.

Madam Chairwoman, this concludes my prepared remarks. I would be happy to respond to any questions that you or other members of the Subcommittee may have.

FOOTNOTES:

1. 49 U.S.C. 11344(c). If a merger transaction does not involve two class I railroads, the ICA requires approval unless the ICC finds there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States and the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. Id. 11344(d).

2. 49 U.S.C. 11344(b)(1).

3. 15 U.S.C. 18a.

4. 15 U.S.C. 18(b)(1), (e).

Exhibit 5

Railroad Access and Competition Issues

John Frittelli
Specialist in Transportation Policy

January 10, 2008

Congressional Research Service
7-5700
www.crs.gov
RL34117

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

Some bulk shippers, particularly those that are served by, or, in the view of some, "are captive to," one railroad, are extremely frustrated with what they perceive as poor rail service and exorbitant rail rates. "Captive shippers" claim that the railroad serving them acts like a monopoly—charging excessively high rates and providing less service than they require. Beginning in the late 1970s, Congress gave railroads flexibility to set rates and to enter into confidential contracts with their customers. Over the last decade, large railroads have consolidated and, particularly in the past two years, have achieved higher profitability. Some Members of Congress believe that the present, mostly deregulated, regime needs to be revised to provide more weight for the interests of "captive shippers." A major point of contention is whether current railroad industry practices should be changed to provide "captive shippers" with more railroad routing options.

Legislation has been introduced in the 110th Congress that would overrule regulatory decisions preventing shippers from gaining access to a second railroad—The Railroad Competition and Service Improvement Act of 2007 (S. 953, introduced by Senator John Rockefeller and H.R. 2125, introduced by Representative James Oberstar). This proposal would markedly change current railroad practices to allow "captive shippers" more access to competing railroads by addressing "bottlenecks," "paper barriers," and "terminal switching arrangements." A bottleneck refers to a situation in which only one railroad serves a particular origin or destination but a competing railroad provides parallel track over at least a portion of the route. Currently, the bottleneck carrier is not required to interchange traffic with the competing carrier but captive shippers seek legislative or regulatory change requiring the bottleneck carrier to do so. Paper barriers are contractual agreements between a large railroad selling or leasing a less profitable route segment to a smaller railroad. The agreement typically requires the smaller railroad to interchange all of its traffic with the large railroad, even if it has access to another railroad's network. These agreements are a means of reducing the up-front sale or lease price while enabling the selling railroad to still recover the full value of the route over time. Terminal switching refers to interchanging traffic between competing railroads wherever a terminal provides the possibility to do so. Currently, railroads interchange traffic at terminals only where they find it mutually beneficial to do so.

One issue for Congress is balancing the railroads' ability to earn revenue sufficient to reward shareholders, as well as maintain and improve its network, and the need of captive shippers for reasonable rates and adequate service. However, the captive shipper issue has wider economic implications than just the question of a division of revenue between railroads and their captive customers. Higher fuel prices, congestion on certain segments of the interstate highway system, and rising domestic and international trade volumes are driving shippers to demand more rail capacity. Freight revenues are a significant means of financing rail capacity because the railroads receive negligible public financing. Therefore, a larger policy question is how a legislated solution to the "captive shipper" problem would affect the development of a more robust and efficient railroad system.

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Introduction

Over the last decade, Class I railroads have consolidated and, particularly in the past two years, have achieved higher profitability.[1] The present, mostly deregulated, railway regime was designed during a period when railways were in financial peril. Beginning in the late 1970s, as part of a fundamental change in philosophy that affected the regulation of all modes of transportation, Congress gave railroads more flexibility to set rates and negotiate confidential contracts with their customers. Some Members of Congress believe that the present, mostly deregulated regime needs to be revised to provide more balance for the interests of those rail customers who are served by only one railroad. A major point of contention is whether current railroad industry practices should be changed to provide these customers (referred to as "captive shippers") with more routing options.

Captive rail shippers have been frustrated with what they perceive as poor rail service and exorbitant rail rates. These shippers often cannot ship their product economically by truck because of the bulk quantity or long distance of their shipments and do not have viable access to a navigable waterway to ship by barge. Captive shippers claim that the railroad serving them acts like a monopoly—charging excessively high rates and providing less service than they require.

Captive rail shippers are a minority of all rail customers (by one estimate, accounting for 15% to 20% of all rail movements[2]), and the argument between them and the railroads is long-standing. However, the captive shipper issue has wider economic implications than just the question of a division of revenue between captive shippers and the railroads. The captive shipper problem raises an important policy question for Congress: could more rail-to-rail competition lead to a more robust and efficient railroad system or could it undermine it by discouraging investment in rail infrastructure?

This report provides background on the current railroad regulatory regime. It then examines the three main points of contention between railroads and their captive customers: "bottlenecks," "paper barriers" (also known as "interchange commitments"), and "terminal switching arrangements." It discusses legislation addressing these issues as well as shipper and railroad points of view. The last section of the report discusses the implications of injecting more rail-to-rail competition into the industry.[3]

[1] The Association of American Railroads categorizes railroads based on annual revenues. Class I railroads had revenue of at least $289.4 million in 2004, regional railroads operate at least 350 route-miles and/or had revenues of at least $40 million but below the Class I threshold, and local railroads operate less than 350 route-miles and had revenues of less than $40 million per year. In this report, the terms Class I and main line railroad are used interchangeably while the term short-line railroad is used to mean both regional and local railroads.

[2] An estimate by the former chairman of the Surface Transportation Board (STB) is that about 80% of rail customers are served by only one railroad, but that because most of these customers can also ship by other modes, only about 15% to 20% of all rail movements would be judged captive by the STB Oral testimony of STB Chairman Roger Nober, House Committee on Transportation and Infrastructure, Subcommittee on Railroads, *Status of Railroad Economic Regulation*, March 31, 2004, p. 10.

[3] Captive shippers also seek changes in the regulatory process for determining the reasonableness of rail rates but generally view greater rail-to-rail competition as a more effective means of addressing both rail rate and rail service issues.

Regulatory Background

The last major changes to U.S. law governing rail economic regulation were the Railroad Revitalization and Regulatory Reform Act of 1976 (the so-called "4R Act," P.L. 94-210; 90 Stat. 31) and the Staggers Rail Act of 1980 (P.L. 96-448; 94 Stat. 1898). At that time, there was a widely held view that the U.S. railroads were in a severe and prolonged period of financial decline, and that much of that decline was the result of strict federal regulation of railroad activities. Railroad deregulation was part of a larger movement toward deregulation of all modes of transportation in the late 1970s and early 1980s. Before 1976, the Interstate Commerce Commission (ICC) reviewed almost all rail rates to determine whether they were reasonable and rail shippers were given wide latitude in selecting the routes over which their shipments would travel and the railroad companies that would participate in their traffic. The 4R Act was mostly about restructuring the Northeast railroads and creating Conrail, as well as subsidizing branch lines, but one provision exempted, for the first time, railroad traffic from regulation if the regulation was deemed by the ICC to be an undue burden to commerce and served no useful purpose.[4] The 4R Act also introduced the concept of "market dominance," which the act describes as the "absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which the rate applies." The act directed the ICC to establish standards and procedures for determining when a railroad possesses market dominance over a route.[5] The Staggers Act greatly advanced the movement toward railroad deregulation by granting railroads more freedom to set rates and enter into confidential contracts with their customers. Rates negotiated under contract are not subject to regulatory review on the assumption that a contract reflects shipper and railroad agreement.[6] However, rates published in tariffs and rates for captive traffic are still subject to regulatory oversight.

The Interstate Commerce Commission Termination Act of 1995 (P.L. 104-88; 109 Stat. 803) abolished the ICC and replaced it with the Surface Transportation Board (Board or STB). The ICC Termination Act eliminated many of the functions of the ICC but transferred its remaining functions to the STB. The STB is bipartisan and decisionally independent from, but organizationally housed within, the U.S. Department of Transportation (DOT).[7] The ICC Termination Act left largely intact the regulatory framework that governs captive rail shipper issues. Authorization of the STB expired September 30, 1998, but the agency continues to function through annual appropriations. The most notable issue associated with possible reauthorization of the Board, and the major reason for it not being reauthorized, is the captive rail shipper dispute.

Competition and railroad revenue adequacy figure prominently in national railroad policy. As stated in the Staggers Act and amended by the ICC Termination Act of 1995 (P.L. 104-88; 109 Stat. 803), in regulating the railroad industry, it is the policy of the United States Government "to allow, to the maximum extent possible, competition and the demand for service to establish reasonable rates..." and "to minimize the need for Federal regulatory control over the rail

[4] Section 207 of P.L. 94-210.

[5] Section 202 of P L. 94-210.

[6] 49 USC 10709(c). (About 70% of rail tonnage moved under contract in 2004 according to the GAO report cited above, p 24.)

[7] The three Board members are nominated by the President and confirmed by the Senate. The Chairman is appointed by the President.

transportation system and to require fair and expeditious regulatory decisions when regulation is required...."[8] The law also states a goal "to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board" (the STB conducts an annual evaluation to determine railroad revenue adequacy based on established standards and procedures). The U.S. Department of Transportation (DOT), sharing the view of most observers, believes that the Staggers Act has been "profoundly successful," noting that today the railroads are financially healthy, productivity is high, the industry's infrastructure has been modernized, and shippers have benefitted from lower average rates.[9] A GAO study also notes that the rail industry's health has improved since Staggers but finds that while rates have declined, "they have not done so uniformly, and rates for some commodities are significantly higher than rates for others."[10] The GAO study notes that "the extent of captivity appears to be dropping, but the percentage of industry traffic traveling at rates substantially over the statutory threshold for rate relief has increased from about four percent of tonnage in 1985 to about six percent of tonnage in 2004."[11] The GAO states that "these findings may reflect reasonable economic practices by the railroads in an environment of excess demand, or they may indicate a possible abuse of market power."[12]

Competitive Access Issues and Legislation

The extent that a rail customer should have access to a second, potentially competing railroad is referred to as "competitive access" (shippers sometimes use the term "open access" and railroads use the term "forced access"). Unlike highways, waterways, and airways, which are publicly owned and over which carriers within these respective modes compete against each other for freight or passengers, railways are privately owned and each railroad has exclusive access to its rights-of-way. However, while railroads generally have exclusive access to their rights-of-way, they do share their rights-of-way with other railroads in circumstances where they find it is mutually beneficial to do so. For instance, if two railroads own parallel track in a relatively light traffic area, they may agree to abandon one track and share the other to reduce maintenance costs. Or, in a dense traffic lane, they may agree to designate each track for one direction (i.e., a west-bound track and an east-bound track) to increase train fluidity through the area. However, neither of these situations involves granting access to each other's customers.

In other situations, the STB has required railroads to share track, including access to potential customers on a route, as a condition for approving a merger. For instance, as a condition for approving the merger between Union Pacific (UP) and Southern Pacific (SP) in 1996, the STB granted the BNSF and other railroads trackage rights over about 4,000 miles of track because otherwise the merger would have reduced the number of railroads serving certain shippers from two to one.[13] In the case of the breakup of Conrail in 1997, the two acquiring railroads, Norfolk

[8] See 49 U.S.C. 10101.

[9] Written testimony of Jeffrey N. Shane, Under Secretary for Policy, U S DOT, STB hearing, *Rail Capacity and Infrastructure Improvements*, STB Ex Parte No. 671, April 11, 2007.

[10] GAO, *Freight Railroads. Industry Health Has Improved, but Concerns about Competition and Capacity Should be Addressed*, GAO-07-94, October 2006, p 3.

[11] Ibid., p. 19.

[12] Ibid., p 3.

[13] Trackage rights are the authority granted to one railroad to use the tracks of another railroad for a fee.

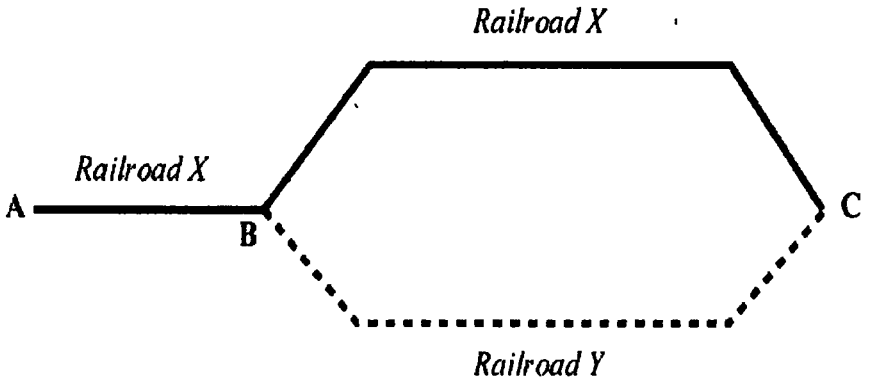
Southern (NS) and CSX, share some of the lines and terminals of the former railroad.[14] Other merger remedies include "switching arrangements" where one carrier transports the railcars of a competing carrier at origin or destination for a fee and "terminal access areas" where the terminal owning railroad allows trains from a competing railroad to use the terminal for a fee. While these track sharing circumstances are not uncommon, neither are they universal.

Legislation has been introduced in the 110th Congress that would allow shippers significantly more access to competing railroads—The Railroad Competition and Service Improvement Act of 2007 (S. 953, introduced by Senator John Rockefeller and H.R. 2125, introduced by Representative James Oberstar). Among other provisions, this legislation addresses three contentious issues between captive shippers and the railroads: "bottlenecks," "paper barriers," and "terminal switching arrangements."

Bottlenecks

A bottleneck refers to a situation where only one railroad has track serving a particular origin or destination but where another railroad also owns track that parallels at least a portion of the route between the same origin and destination. This situation is most easily explained with a diagram.

Figure 1. A Bottleneck Situation



Source: CRS.

In the diagram above, the bottleneck portion of the route between origin A and destination C is the rail segment from A to B because only one railroad, *Railroad X*, has track between these two points. The non-bottleneck portion of the route is from points B to C because two railroads have track between these two points. Under existing practice, *Railroad X*, the bottleneck carrier, can exclusively serve all traffic from origin A to destination C by insisting on only offering a through rate from A to C even though *Railroad X* could potentially interchange traffic with *Railroad Y* at point B. By only offering through rates, *Railroad X* prevents *Railroad Y* from competing for the through traffic between points A and C.

Bottleneck rate practices were affirmed by the STB in December 1996 in its ruling on three coal rate cases brought by several utilities.[15] The STB ruled that railroads did not have to "short-haul"

[14] For details of this arrangement, see http://www.conrail.com/Freight.htm

[15] Central Power & Light Co. v. Southern Pacific Transp Co., 1 STB 1059 (1996) ("Bottleneck I"), modified in part, 2 (continued...)

themselves by offering rates on only a portion of a route if they could serve the entire route. The Board cited the section of statute that states that a rail carrier may establish "any rate for transportation or service."[16] The Board decided that a railroad only has to offer a rate on the one route the railroad deems most efficient for handling the cargo. A railroad does not have to offer rates for any alternative routes that the shipper requests. The STB did establish an exception to this ruling. If a shipper has already entered into a contract with the non-bottleneck carrier for the non-bottleneck portion of the route (in other words, in the diagram above, a contract with *Railroad Y* for the movement between points B and C), then the bottleneck railroad (*Railroad X*) must in fact segment the route and offer a separate rate for the bottleneck (short-haul) portion of the shipment. In practice, however, the non-bottleneck railroad generally has not entered into a contract with a shipper under these circumstances.

H.R. 2125 and S. 953 would require railroads to provide a rate on any bottleneck segment of a route. Thus, in **Figure 1** above, a shipper located at origin A could require railroad X to quote rates from both A to B and from B to C. It could also seek a rate from railroad Y from point B to C. If the shipper chose railroad Y to carry its traffic from B to C, railroad X would be required to interchange the traffic at point B.

Bottlenecks and Railroad Mergers

In 1970, there were 71 Class I railroads in the United States. Today there are seven (two of which are Canadian railroads with U.S. subsidiaries). Captive shippers contend that the consolidation of the railroad industry has led to more bottleneck situations in the nation's rail network. Railroads contend that the number of captive shippers has remained about the same throughout the merger process. They assert that this is because the STB has required railroads to share access to track as a condition for approving a merger in those instances where the merger would otherwise result in captive traffic (as described above).

In addition to these merger remedies, railroads also contend that recent mergers have not resulted in more captive shippers because most mergers since 1980 have been "end-to-end" consolidations rather than mergers between neighboring railroads with parallel track. In an effort to exploit their comparative advantage (long-distance movement of freight), the Class I railroads have sought mergers with their interline partners, that is, with a railroad whose route network begins at the end point of their route network. By reducing the amount of interchanging between interline railroads, railroads believe that a merged railroad can better streamline its operations. In 1970, the average length of haul for a Class I rail shipment was 515 miles. Today it is more than 860 miles.[17] In addition to focusing on long-distance freight, the Class I carriers are deploying longer trains, utilizing bigger railcars, and trying to operate these trains, to the greatest extent possible, so that all the cars in the train have the same origin and destination ("through-blocking"). By reducing the amount of car switching that is required between a given origin and destination, the railroad can simplify its operation, reduce costs, and improve transit time reliability. The railroads argue that these benefits are passed on to shippers in the form of lower rates and improved service, and consequently, rail mergers benefit their customers also.

(...continued)

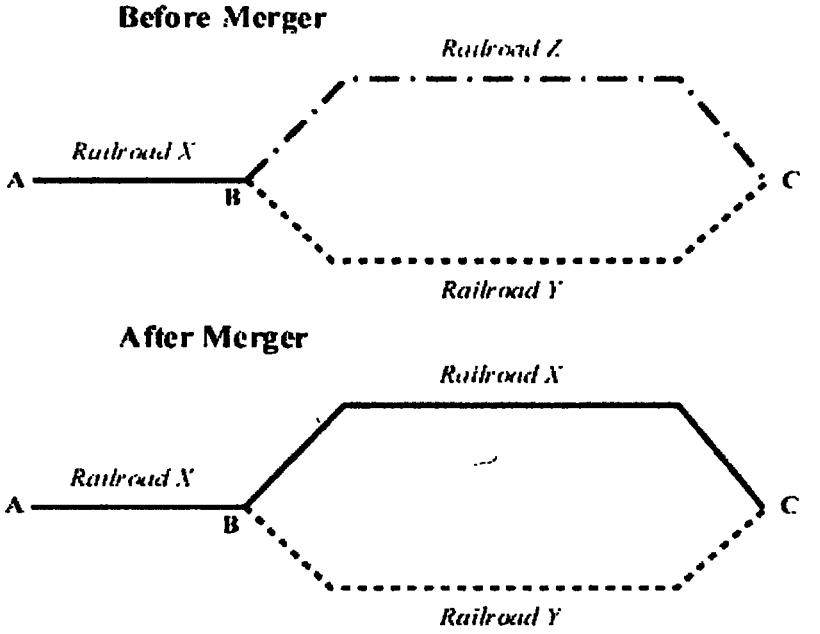
STB 235 (1997) ("Bottleneck II"), aff'd sub nom MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999), cert. denied, 528 U.S. 950 (1999).

[16] 49 USC 10701(c).

[17] AAR, *Railroad Facts*, 2004 edition, p 36.

However, even end-to-end rail mergers can result in bottlenecks. The diagram below illustrates how a bottleneck situation might arise as the result of an end-to-end rail merger, in this case a merger between *Railroad X* and *Railroad Z*.

Figure 2. Bottlenecks and Railroad Mergers



Source: CRS.

Paper Barriers[18]

Beginning in the 1970s and accelerating during the 1980s, the Class I railroads consolidated their network by concentrating traffic over their trunk lines while abandoning their lighter-density, feeder lines. Since 1980, Class I railroads have shed about 66,000 route-miles. While some of these light-density lines have been abandoned, many of them have been sold (or more often leased) to short-line railroads. Today, 550 short line railroads operate 50,000 route-miles, which represent about 29% of the nation's rail network. It is estimated that short-line railroads originate or terminate about one in four carloads moved by Class I railroads. Especially in agricultural states, short-line railroads perform a gathering function, linking mostly rural shippers to high-volume Class I main lines.

Typically, when a Class I railroad sells or leases a track segment to a short-line railroad, the Class I railroad offers a much lower price (maybe lower rent or no rent) if the short-line agrees to interchange all of the existing traffic on the line with the selling railroad. These selling arrangements are referred to as "paper barriers." Under these arrangements, the main line railroad can ensure that it will maintain the traffic (and the freight revenues) that the feeder line generated on its main line network. It is also purportedly the case that potential short-line operators simply do not have the finances necessary to buy the line outright at fair market value, so the selling

[18] The railroad industry prefers the term "interchange commitments."

railroad uses an interchange commitment to recover the line's fair market value. New traffic that the short-line is able to generate after the sale, either by finding new customers or additional cargo from existing customers that previously moved by non-rail modes, may not be subject to this interline restriction.[19]

H.R. 2125 and S. 953 would disallow interchange commitments between a Class I railroad and a Class II or III railroad as part of a rail line sale and it would disallow charging higher per car interchange rates for Class II or III railroads to interchange traffic with a railroad other than the selling railroad. Captive shippers support eliminating paper barriers because they view it as a means for increasing rail-to-rail competition. They further argue that in an era of tight rail capacity, where certain segments are prone to delays, it is simply bad public policy to not allow shippers to utilize all potential routing options.

Short-line railroads contend that banning paper barriers would negatively affect their potential customers because it would discourage Class I railroads from selling the lines in question for fear of losing freight revenue to a competing main line railroad. Because Class I railroads typically view the line in question as less profitable, they are reluctant to reinvest in the line, leaving those customers located on the line with inferior rail service. Short-lines argue that these rail customers could receive much better service if the line was under their management. Most agree that short-line railroads have a good track record for improving service because their customers are central to the viability of their enterprise, rather than being marginal contributors.[20]

Terminal Switching Arrangements

Railroads often interchange traffic with one another at terminals located at the end points of their network, when a shipment's origin and destination traverses more than one railroad's network. This type of interchange can be viewed as an operating partnership among two or more railroads that is necessary to complete an interline movement. By statute, an origin railroad and a destination railroad are required to provide a physical connection with each other's network.[21]

Another kind of interchange is when a railroad interchanges cargo at terminals within its network with a competing railroad that offers an alternative route to the same destination. The interchange may also involve use of the owning railroad's tracks outside the terminal area for a reasonable distance. Under existing practice, this type of interchange generally occurs only on certain segments of rail routings because the STB required it as a condition for approving a merger transaction, as mentioned above. Although the law allows the STB to order terminal interswitching if the Board finds it to be practicable and in the public interest, or necessary to provide competitive rail service,[22] the STB will only order such interswitching if it finds anti-

[19] As per STB Ex-Parte 575, 1998, the Class I railroads and short-line railroads have formed a Railway Industry Working Group to address a common set of issues in interline agreements between Class I railroads and short-line railroads

[20] For further railroad and shipper views on paper barriers, see STB hearing, *Review of Rail Access and Competition Issues - Renewed Petition of the Western Coal Traffic League*, STB Ex Parte No. 575, July 27, 2006. Written testimony and a video recording of this hearing is available on the STB's website. http://www.stb.dot.gov. On Oct. 30, 2007, the STB announced proposed regulations requiring railroads to identify any interchange commitment when they seek STB authorization for a rail line sale or lease.

[21] 49 USC 10703.

[22] 49 USC 11102.

competitive conduct.[23] Only if a railroad has used its market powers to extract unreasonable terms on through movements, or if it has used its monopoly position to disregard the shipper's needs by rendering inadequate service, will the Board force terminal interchanges between railroads.

H.R. 2125 and S. 953 states that the Board *shall* require railroads to interchange traffic, if practicable and in the public interest, and would not require that anti-competitive practices first be proven. Captive shippers support this change because they assert that proving anti-competitive conduct by a railroad is excessively onerous. To date, no shipper has succeeded in proving that a terminal owning railroad has engaged in anti-competitive conduct.

The railroads argue that the above proposed change in the law would severely thwart their efforts to streamline their operations. If the law were to require more interchanging of traffic among railroads, the railroads claim that this will increase delays at switching yards, increase cargo handling costs, and therefore make them less competitive relative to other modes. They also contend that if the STB were to require mandatory access to railroad track and terminals, the Board would be put in a position of having to assess the reasonableness of track access charges, thus opening up an entire new area of rail price regulation. The net result, railroads contend, would be more regulation, not more competition.

Shipper Views

Captive rail shippers often supply the nation's basic industries with raw materials, such as coal, chemicals, grain, and construction materials. About 70% of the nation's coal, which generates over half of the nation's electricity, is delivered by rail. According to one report, an electric utility in Arkansas was forced to switch to more expensive natural gas, in part, because the railroad could not deliver coal to its power plants on time.[24] And some utilities have even begun to import coal from South America or Indonesia, at least in part, to lessen their dependence on what they perceive as overpriced and unreliable rail service. Likewise, railroads haul about 40% of the nation's grain. Grain producers have complained about railroads not providing them with enough hopper cars at harvest time to move their product to market. In an attempt to resolve this problem, many grain producers purchased their own fleet of hopper cars, but now they complain that railroads do not provide the locomotives and crew to move their cars.[25] They contend that poor and expensive rail service is driving their customers to overseas sources of grain.

The dispute between railroads and their captive customers is long-standing, pre-dating deregulation, but the dispute has recently been exacerbated by record demand for rail service and higher rail rates. Additional indicators of railroad market power that captive shippers point to are the railroads return to public pricing and the manner in which they have recently assessed fuel surcharges. With some of their customers, railroads have returned to a system of utilizing public tariff rates rather than entering into confidential contracts with these customers. These customers complain that public pricing allows the railroads to raise prices with little warning and, since

[23] See Midtec Paper Corp. v. Chicago & N.W. Transp. Co., 3 ICC 2d 171 (1986), aff'd sub nom. Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988).

[24] "As Utilities Seek More Coal, Railroads Struggle to Deliver," *Wall Street Journal*, March 15, 2006, p. A1.

[25] Written testimony of National Association of Wheat Growers, Senate Committee on Commerce, Science, and Transportation, Subcommittee on Surface Transportation and Merchant Marine, *Economics, Service, and Capacity in the Freight Railroad Industry*, June 21, 2006

there are likely only two railroads serving a particular region, provides opportunity for price signaling between the railroads. Shippers have also complained about railroads using recent spikes in fuel prices to pad their freight bills by basing their fuel surcharges on a simple percentage of the freight bill rather than basing it on the actual (or estimated) amount of fuel burned for a particular shipment. The STB investigated this practice and in January 2007 directed the railroads to change their fuel surcharge method to reflect actual costs.[26]

In addition to the captive shipper groups that represent coal, chemical, and grain shippers,[27] some other shipper groups also believe that more rail-to-rail competition is needed in the rail industry. The National Industrial Transportation League (NITL), which represents a wide diversity of shippers and carriers, supports a reversal of the STB's existing "bottleneck" decisions and a lowering of the STB's barriers to reciprocal switching.[28] The NITL argues that,

> Competition drives efficiencies and innovation. It leads to a fundamental shift in thinking, away from a static and ultimately counterproductive effort to protect a "franchise," toward a positive effort to grow business opportunities and eliminate costs. Competition promotes cooperation between transportation providers and their customers as both become partners in an effort to eliminate inefficiencies and improve their market opportunities. The result of these efforts is increased demand for the service—that is, growth.[29]

However, other rail customers do not support the captive shipper legislative agenda. Intermodal rail customers (that utilize the railroads to haul freight in shipping containers and truck-trailers) are more likely to view greater investment in rail infrastructure as a more effective remedy to tight rail capacity and rail service problems. For instance, UPS (one of the railroads' largest intermodal customers) supports the concept of creating a federal rail trust fund to accelerate the pace of rail infrastructure expansion. Ocean container lines and intermodal truckers stress the importance of maintaining a regulatory environment that does not impede the railroads' ability to reinvest in their infrastructure. Some intermodal shipper groups, like the Waterfront Coalition, the Intermodal Association of North America, the National Retail Federation, the Retail Industry Leaders Association, and the American Apparel and Footwear Association support a 25% rail investment tax credit legislative proposal.[30] These rail customers may be concerned that if the captive shippers' legislative proposals are adopted, more rail resources, already in tight supply, will be shifted toward serving captive customers at the expense of serving the fast growing intermodal segment of the industry.

While captive shippers have been the most vocal about railroad market power and alleged poor rail service, tight rail capacity and higher rates have prompted some intermodal customers to also express concern on these matters. For instance, UPS stated at an STB hearing on rail capacity, "Are we captive? No. Are we constructively captive? Yes."[31] UPS also stated that while it views

[26] see STB Ex Parte No. 661, *Rail Fuel Surcharges*, January 25, 2007.

[27] These groups include the Western Coal Traffic League, National Grain and Feed Association, American Chemistry Council, Consumers United for Rail Equity, and the Alliance for Rail Competition.

[28] Written testimony of NITL, STB hearing, *The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead*, STB Ex Parte No. 658, October 12, 2005.

[29] Written testimony of NITL, House Transportation and Infrastructure Committee, Subcommittee on Railroads, *The Status of the Surface Transportation Board and Railroad Economic Regulation*, March 31, 2004.

[30] The Freight Rail Infrastructure Capacity Expansion Act of 2007, S. 1125, introduced by Senator Trent Lott and H.R 2116, introduced by Representative Kendrick Meek

[31] Oral testimony of Thomas F. Jensen, Vice President UPS at STB hearing, *Rail Capacity and Infrastructure* (continued...)

the railroads as partners in moving UPS freight, it is dissatisfied with the overall level of rail service, the slow pace at which railroads adopt technological innovations that could help address service shortcomings, and the railroads' annual spending on infrastructure improvements. Ocean container lines, which rely on railroads extensively to move their containers between U.S. ports and distant inland destinations and origins, reportedly are experiencing railroad rate increases of 30% to 40%, with one shipping line executive noting that railroads have "immense bargaining power" because of their "virtual duopoly in each half of the country," while a container shipper notes that railroads "can almost dictate this [the rate increase]" because "we don't have anywhere else to go."[32] The rationing of intermodal rail service at West Coast ports in 2004, in which two railroads limited the number of marine containers they would accept on a daily basis at these ports, is another indication of railroad market power, according to some observers.[33] The largest trucking firms, which utilize the railroads for line-haul movement of their trailers on their busiest traffic lanes, have also expressed disappointment with rail service and note that they have shifted more of their trailers back to the highway mode because of inconsistent rail service.[34] Although intermodal shippers theoretically have the option of shifting to the truck mode, increases in fuel prices[35] and insurance rates, truck driver shortages, and new hours-of-service rules for truck drivers means that large volume intermodal shippers like UPS, ocean container lines, and even large trucking firms cannot realistically shift their long-distance freight to the truck mode without "pricing-out" a significant portion of their customer base.

Railroad Industry Views

Rather than being indications of excessive market power, the railroads argue that their recent pricing and investment strategies are rational responses to changing economic circumstances. They argue the shift from a rail market with excess capacity to a rail market with excess demand dictates price increases and a preference by the railroads for shorter term contracts or, in some cases, public pricing. The railroads note that many of the contracts that recently expired were negotiated many years ago when the railroads had excess capacity and thus were eager to sign long-term contracts.

Railroads argue that rail infrastructure is a fixed and long term (30 to 40 years) investment and thus they must be confident that a demand increase is going to be sustained over the long-term and is not a temporary phenomenon, before making additional investments. Recent coal delivery problems and the allocation of train service at West Coast ports in 2004 were the result of an unexpected surge in traffic in these rail markets, they contend. They note that their supply chain partners, like coal producers and public utilities, also face a need to upgrade and modernize their train loading or unloading equipment to handle more reliably larger amounts of coal. Steamship lines and terminal operators also play a role in the container supply chain—a shortage of dockworker labor was a significant contributing factor to the backlog of container operations that occurred at West Coast ports in 2004. As for grain delivery issues, railroads view this market as

(...continued)

Requirements, STB Ex Parte No. 671, April 11, 2007.

[32] William Armbruster, "Power Play," *Journal of Commerce*, November 27, 2006, p 26.

[33] John Gallagher, "Peak Service, Peak Prices," *Traffic World*, August 16, 2004, p. 26

[34] See, for example, John D. Schulz, "Lofgren On Rail 'Disappointing'" *Traffic World*, August 23, 2004, p. 11.

[35] Per ton of cargo, trucking is much more fuel intensive than rail.

especially volatile—not only in the size of the harvest each year but in the destinations that grain producers may want to ship to from year to year. As the U.S. DOT has stated on rail capacity and infrastructure requirements, "The bottom line on any rail expansion is the requirement by investors for an adequate return on that investment. The industry appears to be making capacity-enhancing investments at a responsible pace, but is unlikely to invest to meet what it observes as surge demand."[36]

The railroads assert that they are expending enormous resources to improve their asset base, adopting new technology to increase railroad efficiency and safety, and entering into innovative collaborations with one another to offer better service. The Association of American Railroads (AAR) reports that Class I railroads typically spend 40 cents out of every revenue dollar on capital and maintenance expenses related to infrastructure and equipment.[37] A sample of infrastructure expansion projects cited by railroads in 2007 includes double- or triple-tracking about 40 miles of BNSF's southern transcontinental route, double-tracking more than 60 miles on Union Pacific's (UP) Sunset Corridor, and adding 60 miles of third or fourth track to the Powder River Basin joint line in Wyoming that both these railroads share. CSX is adding capacity on its lines between Chicago and Florida and between Albany and New York, and Norfolk Southern Railway and Kansas City Southern Railway are improving capacity on the "Meridian Speedway" between Meridian, MS and Shreveport, LA. In addition, the industry is hiring thousands of new employees and adding hundreds of locomotives. The railroads are testing new train control technology and new braking systems that will increase safety but also increase the train capacity of existing track. Eastern and western railroads are partnering to offer faster service for coast to coast shipments. For example, CSX and UP offer an "Express Lane" service from the Pacific Northwest to New York to haul fruits and vegetables. UP and NS partnered to cut 150 miles off a route between Los Angeles and the Southeast, and UP and Canadian Pacific Railway (CP) improved their interchange of export grain shipments in Idaho by streamlining the customs clearance process.

Railroads also note that they compete with trucks and barges for much of their traffic base and they believe that these modes have an unfair advantage. While railroads by and large finance their own infrastructure and pay property taxes on it, taxpayers pay for most of the locks, dams, and dredging that barges rely on, and the heaviest trucks, in the view of railroads, are cross-subsidized by lighter vehicles in the provision of highway infrastructure.

An Issue for Congress or the STB?

Captive shippers contend that the STB is biased in favor of the railroads in interpreting statute and thus believe legislative change is needed to overrule certain Board decisions. However, they note that the STB could, under its existing authority, give greater weight to competition as opposed to railroad revenue adequacy in interpreting the Staggers Act. For instance, they note that the STB modified rail merger rules in 2001 to require that future rail merger applicants demonstrate how the proposed merger would enhance competition rather than merely preserve competition through such means as terminal switching arrangements, trackage rights, and

[36] Written testimony of Jeffrey Shane, Under Secretary for Policy, U.S. DOT, STB hearing: *Rail Capacity and Infrastructure Requirements*, Ex Parte No. 671, April 4, 2007.

[37] Statement of Craig Rockey, Association of American Railroads to the National Surface Transportation Policy and Revenue Study Commission, March 19, 2007.

eliminating restrictions on interchanges with short-line railroads, among other measures.[38] Other shippers note that the STB could, under its existing authority, assist captive shippers by establishing, monitoring, and publishing railroad service performance metrics.[39] By shining the spotlight on poor service, these shippers believe railroads would improve their performance.

In 1998, the Senate Commerce Committee sent a letter to the STB asking it to hold hearings and consider written comments on the subject of railroad competition issues. Hearings were held, and the STB also directed the railroads to arrange meetings with shippers to see if they could mutually identify certain measures that would facilitate greater railroad access where needed.[40] Neither the hearings nor the meetings produced any clear policy direction and the STB Chairman at that time reported to the Senate Commerce Committee that rail competition policy would be more appropriately established by Congress, than the more administratively focused STB:

> The differences between the railroads and the shippers on the Board's competitive access rules are fundamental, and they raise basic policy issues—concerning the appropriate role of competition, differential pricing, and how railroads earn revenues and structure their services—that are more appropriately resolved by Congress than by an administrative agency....[41]

Policy Implications

Although the captive shipper debate has continued for over two decades, some believe changing economic circumstances have recast the debate. Captive shippers assert that the recently improved financial health of the railroad industry warrants a reexamination of the goals of railroad policy as stated in the Staggers Act. They contend that existing interpretations of the statute are based on precedents established in an outdated era of excess rail capacity. With segments of the rail network now experiencing congestion, captive shippers argue that, as a matter of public policy, rail shippers should be given greater latitude to reroute their traffic to less capacity-constrained routes. The railroads counter that the unprecedented demand for their services requires them to shift from a strategy of shedding underutilized capacity to one of financing an expanded rail network. Determining how much intramodal rail competition is optimal is central to striking the appropriate balance between these two objectives.[42]

The railroads believe that the kind of increased rail-to-rail competition captive shippers seek would be harmful to the financial health of their industry.[43] If railroads are forced to share their

[38] see STB Ex Parte No. 582 (Sub-No. 1), *Major Rail Consolidation Procedures*, June 11, 2001. No Class I railroads have sought a merger under the new procedures.

[39] In response to a GAO recommendation, the STB hired an economic consulting firm to conduct a study on the current state of competition in the railroad industry that is expected to be completed in the Fall of 2008. See STB press release no 07-31, dated Sept. 13, 2007.

[40] see STB Ex Parte No. 575, *Review of Rail Access and Competition Issues*, hearings held April 2 and 3, 1998.

[41] Letter dated December 21, 1998 from the Honorable Linda Morgan, Chairman, Surface Transportation Board, to the Honorable John McCain and the Honorable Kay Bailey Hutchison.

[42] Further information on shipper and railroad views on this issue is available from an STB public hearing, "The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead," Ex Parte 658, October 19, 2005. Written testimony and an audio recording of the hearing is available at http://www.stb.dot.gov.

[43] For further discussion of the railroad industry's point of view, see Richard A. Allen, "Rail Access in the 21st Century A Rail Attorney's Perspective," *Journal of Transportation Law, Logistics, and Policy*, vol. 70, no. 2, 2003, p. 192.

right-of-ways with other railroads, even at compensatory rates, they argue, it would undermine their incentive to reinvest in their infrastructure. For example, they assert that the Dakota, Minnesota, and Eastern Railroad (DM&E) would never have undertaken its effort to build a third rail line into the Powder River Basin if it were required to share that line with competitors.[44] The railroads argue that if they are not able to price their service based on the demand for rail service, they will not be able to recover their costs, and eventually could require government subsidies to continue operating. Furthermore, they assert that just as few U.S. cities are able to support two major league baseball teams, not every shipper can sustain the services of two railroads. In other words, even if a bottleneck shipper were to gain access to a second railroad, that shipper may not generate enough business to attract more than one railroad's investment in the physical facilities necessary to serve that customer.

On the other side of the issue, captive shippers believe that increased competition is the means for improving railroad financial health.[45] They argue that competition spurs efficiency and innovation and creates a sense of urgency. In the words of one industry observer, "The culture of large freight railroads is one that is slow to change and has never been known to have keen market sensitivity.... Adequate railroad competition could add to railroad efficiency, but more importantly, could provide the needed sensitivity to shipper needs."[46] Proponents of competition criticize the railroads' position as relying on a static economic model that fails to recognize the financial benefits that increased competition generates. They assert that competition leads to more responsive service, which leads to more rail traffic and an emphasis on eliminating unnecessary costs, which leads to price reductions that stimulate more demand for rail service, which would lead to more railroad revenue. In short, achieving railroad financial viability and satisfying railroad customers are, in this view, two sides of the same coin.

Increasing competition among railroads could, in the view of some, result in a reduced geographic scope of the rail network that serves only higher margin customers. This view was articulated by Linda Morgan, a former chairwoman of the STB:

> The shape and condition of the rail system that open access would produce is a significant issue that was not resolved at the hearings. The shippers assume that the replacement of differential pricing by purely competitive pricing would reduce the rates paid by shippers. The railroads, by contrast, would argue that, because their traffic base would shrink, the rates paid by those shippers that would continue to receive service would actually increase, even as overall revenues received by railroads would decline, because the overall traffic base from which costs would be recovered would be reduced More specifically, carriers could be expected to seek to maintain an adequate rate of return by cutting their costs, which could include the shedding of unprofitable lines. Thus, it is quite possible that open access would produce a smaller rail system (although not necessarily a degraded one) that would serve fewer and a different mix of customers than are served today, with different types of, and possibly more efficient but more selectively provided, service. We leave open for public discussion the issue of whether that type of a rail system, which might not serve shippers of

[44] The Powder River Basin is the Nation's largest source of coal, responsible for the fuel that generates about 20% of the nation's electricity. The most productive part of the basin is currently served by two railroads.

[45] For further discussion of the shipper's point of view, see Nicholas J. DiMichael, "Rail Access in the 21st Century: A Shipper Attorney's Perspective," *Journal of Transportation Law, Logistics, and Policy*, vol. 70, no. 2, 2003, p. 175.

[46] Written testimony of Harvey A. Levine, Senate Committee on Commerce, Science, and Transportation, Subcommittee on Surface Transportation and Merchant Marine, *Oversight Hearing on the State of the Railroad Industry*, May 9, 2001.

> less desirable traffic, would better serve the interest of shippers, labor, and the public generally.[47]

Another view is that multiple railroads operating over the same rail line will actually increase the cost of railroad operations, thus increasing the price of railroad services to all rail shippers. This view was suggested by a study funded by the Federal Railroad Administration:[48]

> Arguments advocating competitive policies in the rail industry generally highlight the textbook advantages of competition over monopoly of a larger sum of consumer and producer surplus due to a restriction on output by monopoly. However, the advantages are only so clear when the costs of providing services are the same for competitive or monopoly firms In cases where there are substantial economies of scale and scope in the production (as there appears to be in the rail industry), competition can increase the costs of resources used in production, potentially reducing societal welfare.

All agree that the nation needs a robust and efficient railroad system. Its inherent advantage in hauling large volumes of heavy freight long distances is especially beneficial during periods of high fuel prices, rising trade volumes, and growing demand for raw material transport. Whether elimination of the captive shipper problem would be detrimental or beneficial to maintaining a strong and vibrant railroad system is disputed among stakeholders as well as outside observers.

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[47] STB Ex Parte No. 575, *Review of Rail Access and Competition Issues*. Decided April 16, 1998, at footnote 3.

[48] John Bitzan, Ph.D. North Dakota State University, "Railroad Cost Conditions - Implications for Policy," May 10, 2000, p. v. Available at http://www fra.dot.gov/downloads%5Cpolicy%5Crr_costs.pdf. (Viewed August 1, 2007)

REDACTED
Exhibits 6-14

Exhibit 15


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REDACTED
Exhibits 16-37

Exhibit 38

PRESS RELEASE

UNION PACIFIC ANNOUNCES AGREEMENT TO MERGE WITH SOUTHERN PACIFIC

Bethlehem, PA, August 3 -- Union Pacific Corporation (NYSE: UNP) and Southern Pacific Rail Corporation (NYSE: RSP) announced today that they have reached an agreement providing for the merger of Southern Pacific with Union Pacific. The $5.4 billion transaction would form North America's largest railroad, a 34,000-mile network operating in 25 states and serving both Mexico and Canada. The two railroad companies had combined 1994 operating revenues of $9.54 billion.

The agreement, approved today by the Boards of Directors of Union Pacific and Southern Pacific, is subject to execution of a definitive merger agreement, which is expected to be signed very shortly. Under terms of the agreement, Union Pacific would make a first-step cash tender offer of $25.00 a share for up to 25 percent of the Common Stock of Southern Pacific. The tender offer would commence next week. The shares purchased in the tender offer will be held in a voting trust. Following completion of the offer, and the satisfaction of other conditions, including approval by the Interstate Commerce Commission (ICC), Southern Pacific will be merged with Union Pacific Corporation. Upon completing the transaction, each share of Southern Pacific stock will be converted, at the holders election (subject to proration), into the right to receive $25.00 in cash or 0.4065 shares of Union Pacific Common Stock. As a result of the transaction, 60 percent of Southern Pacific shares will be converted into Union Pacific stock and the remaining 40 percent into cash, including the shares acquired in the original tender offer. The two companies expect to file an application with the ICC no later than December 1.

Union Pacific also stated that the previously announced spin-off of Union Pacific Resources would be consummated after completion of the transaction. The initial public offering of shares of Union Pacific Resources will proceed as scheduled.

In connection with the merger, Philip Anschutz, a major shareholder of Southern Pacific, will be appointed non-executive Vice Chairman of the Board of Directors of Union Pacific following completion of the transaction and will enter into a customary seven-year standstill agreement. In addition, Mr. Anschutz, who owns 31 percent of Southern Pacific, and the Morgan Stanley Leveraged Equity Fund, which owns seven percent of Southern Pacific, have agreed to vote their shares in favor of the transaction.

When completed, this transaction will deliver major benefits for customers, said Drew Lewis, Union Pacific's Chairman and Chief Executive Officer. The combined system will be able to offer new services that neither Union Pacific nor Southern Pacific can offer on its own. The new system will yield extensive new single-line service, faster schedules, more frequent and reliable service, shorter routes and improved equipment utilization. Benefits from operating efficiencies, facility consolidations, cost savings and increased traffic are estimated to be in excess of $500 million per year.

BENEFITS

A century and a quarter ago at Promontory, Utah, Union Pacific joined Southern Pacific's predecessor, the Central Pacific, to create the nation's first transcontinental railroad and link California to the rest of the nation. Later, far to the south, Southern Pacific and the Texas & Pacific, a predecessor of UP, were joined to open up the Southwest. Now, in the wake of the Burlington Northern/Santa Fe merger, the time has come to complete the restructuring of the major western railroads by recreating these historic and highly efficient transcontinental routes and forging a worthy competitor to BN/Santa Fe.

The merger of the Union Pacific and Southern Pacific railroads will provide dramatic service improvements to shippers, significantly strengthen western rail competition, and help position American industry to be fully competitive domestically and internationally in the 21st Century.

Competition Will Be Strengthened

- UP is financially strong and provides solid service, but lacks efficient routes to many markets; SP has many excellent routes but lacks the volume and capital to take advantage of its opportunities.

- BN/Santa Fe will be nearly twice the size of UP or SP. Combining UP and SP will create a competitor that is fully the equal of BN/Santa Fe in all major western markets.

- Neither UP nor SP match Santa Fe service time or reliability in the California-Chicago markets. Strengthened by its merger with BN, Santa Fe's edge in these key markets will increase.

- UP and SP overlap at some points but are end to end at many others. Together they form a network offering countless opportunities for service improvements and efficiencies.

- UP and SP will agree to conditions that give another railroad access to those points where UP and SP are the only competitors (just as BN and Santa Fe did).

- Cost savings are expected to be in excess of $500 million per year.

- SP shippers will have the assurance of long-term, top-quality service from a financially-sound carrier.

Public Benefits From Combined UP/SP Can Offer:

- Shippers will enjoy single line service between UP's South Central origins and SP receivers in California, SP Oregon lumber shippers and UP destinations in the Upper Midwest, UP Iowa and Nebraska grain producers and SP feeder markets in the San Joaquin and Imperial Valleys, and more.

- Shorter routes will allow faster, more reliable service in many corridors, including Chicago-Oakland and Memphis-Los Angeles.

- Carload shippers will receive much better service across the Central Corridor.

Optimizing Capacity Saves Capital While Improving Service

- Flexibility derived from alternative routes and yards will reduce transit time and allow more trains to be run without congestion. Examples:

-- Chicago-Southern California: By shifting manifest traffic to UP's Central Corridor route and expedited traffic to SP's Tucumcari route, UP/SP will move expedited traffic faster and more reliably. By combining SP's excellent LA intermodal terminals with UP's outstanding Chicago terminals, UP/SP will be able to deliver reliable third-morning service in this corridor.

-- Houston-St. Louis: Using alternative routes and an array of yards, UP/SP will be able to preblock chemical traffic from the Gulf Coast for run through service with Conrail, Norfolk Southern, and CSX, avoiding interchange at St. Louis, and to expedite traffic over other congested gateways such as Chicago, Memphis, and New Orleans. Shorter routes will save at least 24 hours over existing UP or SP service.

-- Combining UP and SP will alleviate existing bottlenecks, thus freeing capital to upgrade crucial lines (e.g., Tucumcari, Ft. Worth-El Paso) and build facilities needed to serve new markets (e.g., Inland Empire intermodal facility in Southern California).

-- Service disruptions due to traffic maintenance work will be reduced. Maintenance can be scheduled for longer, more efficient windows while traffic moves over the alternate route.

-- Terminal consolidations will free yard space for storage in transit.

Better Use of Cars and Locomotives

- Merged UP and SP will be able to reposition both cars and locomotives to dramatically improve utilization. UP rolling stock and locomotive power will move efficiently between LA, San Francisco Bay, and the PNW. Additionally, movements between California and Texas will be enhanced.

- Exploiting the difference in peak seasons on the two systems will allow cars to be loaded more frequently - the equivalent of increasing fleet size without spending scarce capital dollars. Triangulation and exploiting backhaul opportunities will also improve equipment supply.

- Shorter routes, preblocking to reduce terminal time, and smoother operations will improve transit time and utilization for both shipper-owned and rail-owned cars.

Southern Pacific Lines

1860 Lincoln Street • 14th Floor • Denver, Colorado 80295 • (303) 812-5001 • Fax: (303) 812-5099

Jerry R. Davis
Chairman and
Chief Executive Officer

August 3, 1995

Dear Valued Customer:

Southern Pacific Rail Corporation and Union Pacific Corporation have reached an agreement to merge, forming a stronger and more efficient rail system that will provide transportation benefits for both companies' customers.

This proposed merger, which is expected to be consummated in mid-1996, will offer many benefits to the shipping public. The attached summary highlights many of these benefits that our customers can look forward to receiving as a result of this combination.

For those customers who have concerns about possible reductions in competition, I want to assure you that Southern Pacific and Union Pacific will be addressing these situations appropriately.

We look forward to discussing this exciting merger proposal with you in more detail, and to explain fully all of the associated benefits. Please do not hesitate to contact your local Southern Pacific representative should you have any questions.

While this merger is pending, Southern Pacific continues to be an independent railroad, and will continue to compete vigorously with all railroads to meet your transportation needs. Your traffic personnel should continue to contact their normal business contacts at Southern Pacific for our services as they have in the past. Our commercial effort, focus and direction has not changed.

The entire Southern Pacific Team and I, appreciate your business and look forward to continuing to serve your transportation needs in the future.

Sincerely,

Attachments

SUMMARY

A Century and a quarter ago at Promontory, Utah. Union Pacific joined Southern Pacific's predecessor, the Central Pacific, to create the nation's first transcontinental railroad and link California to the rest of the nation. Later, far to the south, Southern Pacific and the Texas & Pacific, a predecessor of UP, were joined to open up the Southwest. Now, in the wake of the Burlington Northern/Santa Fe merger, the time has come to complete the restructuring of the major western railroads by recreating these historic and highly efficient transcontinental routes and forging a worthy competitor to BN/Santa Fe.

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- UP and SP overlap at some points but are end to end at many others. Together they form a network offering countless opportunities for service improvements and efficiencies.
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- Shorter routes, preblocking to reduce terminal time, and smoother operations will improve transit time and utilization for both shipper-owned and rail-owned cars.

Fast Facts

Union Pacific Railroad

Operating Revenues
(1994) .....$6.44 billion

Operating Income
(1994) .....$1.4 billion

Employees 35,000

Track operated...22,600 miles

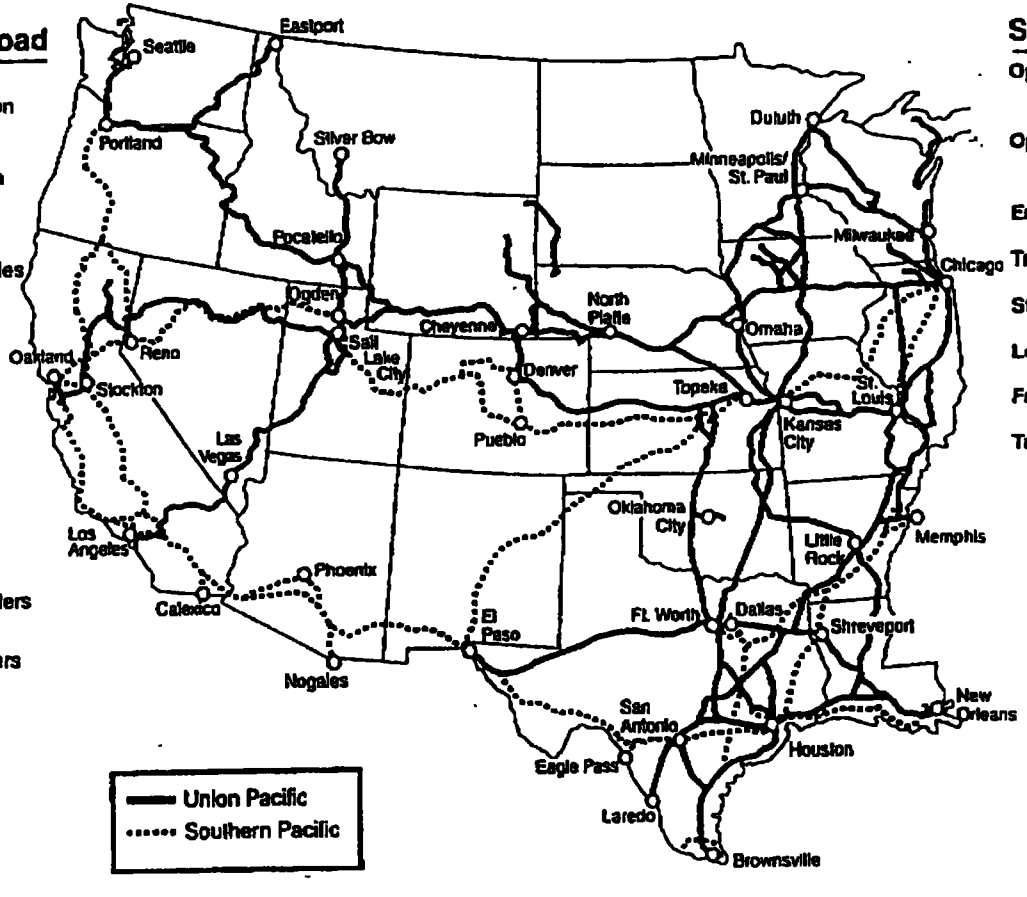
States served....23

Locomotives 3,922

Freight cars.....97,600

Trains operated daily
Freight.....1,200
Commuter.....197

Commuter operations–daily riders
Metra .....90,000 riders (Chicago)
Metrofink.....3,300 riders (Los Angeles)



Southern Pacific Lines

Operating Revenues
(1994) .....$3.1 billion

Operating Income
(1994) .....$346 million

Employees 18,010

Track operated... 14,500 miles

States served.....15

Locomotives 2,413

Freight cars.....44,629

Trains operated daily
Freight.....750

AM/MCRR-P-002307

Exhibit 39

UNION PACIFIC RAILROAD

NEWS RELEASE

Communications Dept.
1416 Dodge Street
Omaha, NE 68179
(402) 271-3478

OMAHA, September 26 -- Union Pacific and Southern Pacific railroads today announced a comprehensive agreement with Burlington Northern Santa Fe Corporation to preserve and intensify rail competition following the UP/SP merger.

Under the agreement, BNSF will be able to serve every shipper that is served jointly by UP and SP today. In addition, UP/SP and BNSF will grant each other further rights which will create new competitive routes in a number of markets.

The agreement calls for nearly 4,100 miles of trackage rights and line sales between UP/SP and BNSF. It guarantees strong rail competition for the Gulf Coast petrochemical belt, U.S.-Mexico border points, the Intermountain West, California, and along the Pacific Coast.

"As part of our merger proposal with Southern Pacific Lines, we promised our customers that we would bring strong rail competition to every point that loses a two-carrier option," said Dick Davidson, Union Pacific Railroad Chairman.

"This agreement backs up that pledge," he said. As part of the agreement, BNSF will not oppose UP's proposed acquisition of SP. "Many of our customers had requested that BNSF be selected as the competitive choice," Davidson added.

"After taking the terms of our agreement with BNSF into account, we're confident we can show a net annual benefit from our proposed merger with SP exceeding $500 million," Davidson said.

-M O R E-

Under the agreement, UP/SP will share more than 3,800 miles of track with BNSF under trackage rights and sell more than 335 miles of track to BNSF.

The line sales portion of the agreement would total about $150 million.

Trackage rights are a contractual arrangement which allow one railroad to operate its trains with its own crews over the tracks of another railroad in exchange for a per mile fee. They are a proven means of providing effective rail service.

"The combined UP/SP competing against the Burlington Northern Santa Fe will benefit rail customers through shorter routes, faster schedules, extensive new single-line service, elimination of capacity bottlenecks, improved car handling at terminals and cost efficiencies," said Davidson.

The competitive agreement covers the following regions:

WEST COAST-INTERMOUNTAIN

Burlington Northern Santa Fe

--BNSF will operate over SP and UP lines between Denver, Colorado and Oakland, California. BNSF will serve Provo, Geneva, Salt Lake City and Ogden, Utah; Reno, Nevada and various other intermediate points. BNSF will operate over both UP's "Feather River" route and SP's Donner Pass line.

--BNSF will purchase UP's "Inside Gateway" route in Northern California between Keddie and Bieber, linking its Oregon lines with its California network.

-M O R E-

--BNSF will serve the Oakland-San Jose area via UP trackage rights.

--BNSF will improve its access to the Port of Oakland over SP trackage rights.

--UP/SP will work with BNSF to assure uninterrupted rail service to the Ports of Long Beach and Los Angeles while the Alameda Corridor project is constructed.

Union Pacific/Southern Pacific

--UP/SP will have trackage rights in Oregon over BNSF between Bend and Chemult, Oregon to connect eastern Oregon and Washington with the SP's I-5 Corridor linking the Pacific Coast.

--UP/SP will gain overhead trackage rights over BNSF's Mojave to Barstow, California line.

--BNSF will enter into a proportional rate agreement with UP/SP over the Portland Gateway which will allow UP/SP to compete with BNSF on business originating or terminating in an area extending from Montana west and from Canada to the Columbia River and destined to or originating in an area extending from Oregon to West Texas.

TEXAS-LOUISIANA

--BNSF will operate over UP between Houston and Brownsville, Texas.

--BNSF will be granted trackage rights on SP's line between Houston and Iowa Jct, Louisiana near Lake Charles. The remaining SP line east to Avondale, Louisiana near New

-M O R E-

Orleans from Iowa Jct. will be sold to BNSF, with UP retaining full trackage rights. This will give BNSF a through route between Houston and New Orleans, where the lines of UP and SP are parallel.

--BNSF will gain access to major petrochemical plants at Mont Belvieu, Baytown, Amelia and Orange, Texas.

--BNSF will operate over various UP and SP routes in Texas, including San Antonio-Sealy, San Antonio-Eagle Pass, Taylor-Round Rock and Waco-Taylor-Smithville.

--UP will sell its Dallas-Waxahachie line to BNSF, but will retain exclusive rights to serve on-line customers.

HOUSTON-MEMPHIS

--BNSF will operate over SP between Houston and Fair Oaks, Arkansas and over UP between Fair Oaks and Memphis, Tennessee. This will give BNSF a through route between Houston and Memphis.

ACCESS

--BNSF will grant UP/SP improved access to the BNSF Chicago-Kansas City line at points west of Chicago; and to dock and port facilities in Superior, Wisconsin and Portland, Oregon.

-M O R E-

The proposed agreement will be submitted to the Union Pacific Corporation Board of Directors at its regularly scheduled meeting on Thursday. The agreement will go before the Southern Pacific Rail Corporation Board of Directors, also meeting on Thursday.

Union Pacific, a subsidiary of Union Pacific Corporation, plans to file its merger application with the Interstate Commerce Commission by December 1. A decision is expected next year.

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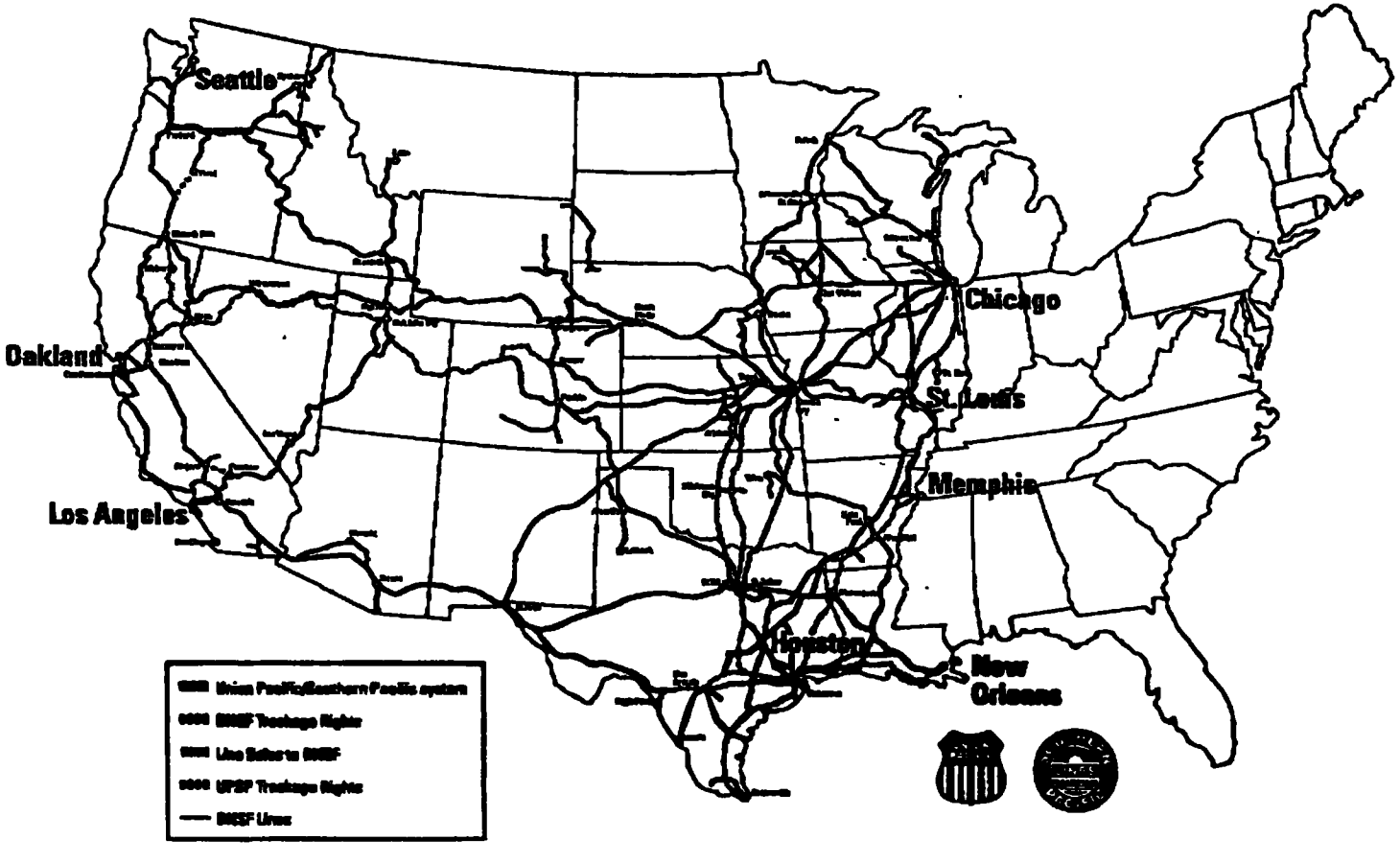
For further information, contact:

John Bromley, Union Pacific, 402-271-3475

Larry Kaufman, Southern Pacific, 303-812-5022



AM/MCRR-P-002324

Exhibit 40

DARREN BUSH, Ph.D., J.D.
ASSOCIATE PROFESSOR OF LAW
UNIVERSITY OF HOUSTON LAW CENTER
HOUSTON, TEXAS

"The Intersection of Competition Policy and Surface Transportation Regulatory Policy: An Examination of H.R. 1650, the "Railroad Antitrust Enforcement Act of 2007"

BEFORE
THE HOUSE JUDICIARY COMMITTEE ANTITRUST TASK FORCE
UNITED STATES CONGRESS

ON

FEBRUARY 25, 2008

Introduction

Mr. Chairman, Ranking Member Keller and other distinguished members of the Judiciary Committee Antitrust Task Force, I want to thank you for giving me the opportunity today to speak about regulation and competition policy in the context of the railroad industry. But more importantly, I would like to thank you for asking the hard questions about the direction of railroad policy in light of the United States' experiences with the railroad industry over the past several decades. My remarks here today are my own, as I do not represent anyone. I speak today based upon my experience as an Antitrust Division trial attorney focused on deregulated industries, as an economist, and as a law professor whose research and writing has focused on antitrust issues arising in the context of regulated/deregulated industries.[1]

Antitrust Immunities and Exemptions in General

[1] The term "deregulation" is a bit of a misnomer. See Harry First, *Regulated Deregulation: The New York Experience in Electric Utility Deregulation*, 33 LOY. U. CHI. L. J. 911 (2002)(noting that New York's electricity market was not deregulated, but in fact replaced "one regulatory system with another.").

In consideration of the repeal of any statutory immunity from the antitrust laws, it is important to consider the realm of possible other immunities and exemptions that may give rise to unforeseen antitrust immunity.

To review some basics, an express antitrust immunity may be justified when a regulatory agency has been expressly empowered by Congress to displace competition in an industry. Congress may expressly confer upon the regulator the exclusive power to control competitive issues within that industry by providing the industry with antitrust immunity.

Traditionally, such grants of authority were for the purpose of displacing competition with rate and entry regulation while providing the firm with a monopoly, albeit a regulated one.[2] The agency would confer upon the industry the right to some reasonable rate of return and an exclusive right to provide service within its territory in exchange for the provision of service to all comers, agency review of rates and costs associated with providing that service, and other hurdles that limited the ability of the firms within that industry to expand into other realms or charge higher rates.

In this realm, the common notion was that antitrust had little to say. Indeed, notions of competition were antithetical to this arrangement.[3] After all, there was little

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[2] *See generally* Darren Bush, *Mission Creep. Antitrust Exemptions and Immunities as Applied to (De)regulated Industries*, 2006 UTAH L. REV. 613.

[3] Darren Bush & Carrie Mayne, *In (Reluctant) Defense of Enron Why Bad Regulation Is to Blame for California's Power Woes (or Why Antitrust Law Fails to Protect against Market Power when the Market Rates Encourage Its Use)*, 83 OR. L. REV. 207, 207 (2004)(noting the historical perspective that regulation and antitrust are substitutes); see Richard D. Cudahy, *The Wearing Away of Regulation· What Remains*, PUB. UTIL. FORT., Oct. 12, 1989, at 9, 9–12; *Consolidation in Telecommunications Industry—Senator Metzenbaum's Views*, 7 TRADE REG. REP. (CCH) ¶ 50,126 ("[F]ederal and state regulation of the telecommunications industry has been and will continue to be a poor substitute for aggressive antitrust review."); Leslie W. Jacobs et al., *Panel Discussion, Deregulation and Expanding Antitrust Liability A New Battleground for Private Antitrust Litigants*, 53 ANTITRUST L. J. 221, 222 (1984) ("When I was

ability to compete between franchises as entry was highly restricted.[4] Moreover, the terms, conditions, and prices of the services offered in such industries were actively overseen by administrative agencies. Thus, with few exceptions, antitrust was required to remain silent.

However, current notions of regulation focus on market mechanisms that are not necessarily antithetical to the antitrust laws.[5] "Regulated" industries today are typically regulated only in the parameters under which competition takes place. Agencies do not to the same degree restrict entry—they encourage it. They no longer to the same degree review rate schedules and tariffs—they allow the market constructed by administrative rules and statutes to determine the rates and prices charged. They also do not to the same degree guarantee a rate of return, instead allowing the market to winnow out losers and reward winners.

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involved with getting the airline industry deregulated, we were quite hopeful that competition would substitute for regulation and that much of the antitrust enforcement would be done by private litigation." (statement of Marvin S. Cohen, Member, D.C. Bar)); Alfred E. Kahn, *Deregulatory Schizophrenia*, 75 CAL. L. REV. 1059, 1059 (1987) ("I agree thoroughly with Judge Breyer that the antitrust laws are not just another form of regulation but an alternative to it—indeed, its very opposite." (footnote omitted)); cf. Peter C. Carstensen, *Evaluating "Deregulation" of Commercial Air Travel False Dichotomization, Untenable Theories, and Unimplemented Premises*, 46 WASH. & LEE L. REV. 109, 116 (1989) (noting dichotomy of regulation/deregulation "is false with respect to analysis of regulation and deregulation of any industry, and is extremely so with respect to commercial air travel").

[4] One notable exception was competition for larger industrial and commercial customers in the electricity industry.

[5] *See* Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 341 (2003). Professor Hovenkamp states:

> One consequence of regulation is a reduced role for the antitrust laws. When the government makes rules about price or output, market forces no longer govern. To that extent antitrust is shoved aside. A corollary is that as an industry undergoes deregulation, or removal from the regulatory process, antitrust re-enters as the residual regulator. Since our fundamental criterion for determining antitrust immunity in regulated industries is the extent of unsupervised private discretionary conduct, the natural result of deregulation is an increased role for the antitrust laws. In general, the more extreme the deregulation--that is, the more that the market is opened to ordinary competitive forces--the greater the role for antitrust.

Id.

Thus, antitrust law and regulation may serve complementary purposes[6] in industries subject to what my colleague Harry First and others have called "regulated deregulation."[7] Under these "new" regulatory schemes common today, express exemptions from the antitrust laws generally will be inappropriate and, therefore, should be rare. In other words, the "default" rule should always be that competition and its enforcement agent, the antitrust laws, prevail.[8]

Linked closely with the notion of express immunity is the doctrine of implied immunities, or claims that Congress "intended" to exempt regulatory conduct from antitrust even though it did not do so by express statutory language. Historically, courts have viewed implied immunities with extreme skepticism. As one group of commentators has stated:

> [T]wo grounds--and only two grounds--will support an implied repeal: the first is irreconcilability and the second is an affirmative showing of legislative intent to repeal by implication. The latter criterion has only been satisfied in cases in which the repealing act contains a directive to the regulatory agency to police the interplay of competitive forces. The irreconcilability criterion requires, at a minimum, that the statutes [antitrust and regulatory] produce differing results. This finding alone is not sufficient however. Rather, to find 'irreconcilability' there must be a determination that

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[6] For a discussion of the complementary nature of regulation and antitrust, *see* Darren Bush & Carrie Mayne, *In (Reluctant) Defense of Enron Why Bad Regulation Is to Blame for California's Power Woes (or Why Antitrust Law Fails to Protect Us Against Market Power When the Market Rules Encourage Its Use)*, 83 OR. L. REV. 207 (2004).

[7] *See* Harry First, *Regulated Deregulation. The New York Experience in Electric Utility Deregulation*, 33 LOY. U. CHI. L. J. 911, 924 (2002)(discussing "regulated deregulation" as the replacement of cost of service regulation with state and federal regulation of "the mechanism put into place to manage competitive markets.")

[8] It follows that antitrust "savings clauses" should not be required. A savings clause, in contrast to establishing competition as the default rule, places the burden upon Congress to actively declare (and redeclare) that the antitrust laws apply. *See, e.g.*, Telecommunications Act of 1996, sec. 601(b)(1), (c)(1), § 152 note, 110 Stat. 56, 143 (1996)(" SAVINGS CLAUSE ... nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws. NO IMPLIED EFFECT ... This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local laws unless expressly so provided in such Act or amendments.").

> repeal of the antitrust laws is necessary to make the regulatory act work. This requires an appreciation of the nature of the various regulatory acts.[9]

Broad delegations of power to a regulatory agency may lead to instances where agency directives are in tension with antitrust law. As Judge Greene's opinion in an early phase of the Antitrust Division's suit against AT&T seeking dissolution of the company on the ground of unlawful monopolization points out, however, such instances are relatively narrow. In response to AT&T's motion to dismiss the suit claiming that Congress had committed regulation of the activity in question to the F.C.C. under the Communications Act of 1934, Judge Greene wrote:

> Regulated conduct is . . .deemed to be immune by implication from the antitrust laws in two relatively *narrow* instances: (1) when a regulatory agency has, with congressional approval, exercised explicit authority over the challenged practice itself (as distinguished from the general subject matter) in such a way that antitrust enforcement would interfere with regulation . . . and (2) when regulation by an agency over an industry or some of its components or practices is so pervasive that Congress is assumed to have determined competition to be an inadequate means of vindicating the public interest.[10]

Particularly in light of the current trend towards "regulated deregulation," it is increasingly unlikely that the roles of regulation and antitrust serve antithetical purposes. Rather, the creation and fostering of competition might indeed be best served by the complementary potential of regulation and antitrust.[11]

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[9] Robert Balter and Christian Day, Implied Antitrust Repeals: Principles for Analysis, 86 DICK. L. REV. 447 (1982). *See also* United States v. National Association of Security Dealers, 422 U.S. 694, 719 (1975)("Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system"); Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975).

[10] U.S. v. Amer. Tel. & Tel. Co., 461 F.Supp. 1314, 1322 (D.C.D.C. 1978)(emphasis supplied).

[11] Similar arguments might be made in favor of a limited state action doctrine and the filed rate doctrine. The original state action doctrine arose out of principles of federalism and a concern that the federal government not intrude upon state created and sanctioned regulation. Again, the most common type of industry regulation was rate and entry regulation. However, "regulated deregulation" has come onto the state scene in many instances. In such instances, it is unlikely that the clearly articulated state policy seeks to displace competition with regulation. Rather the purpose of the policy would be that regulation creates competition. The creation of competition cannot be said to be in contradiction with the purposes of

However, the caselaw is going in the opposite direction.[12] Even where there is no *direct* regulatory oversight, courts have found implied immunity merely due to *potential* regulatory oversight. What remains is a gap between regulation and antitrust, where neither serve to provide essential oversight to an industry.

One reason for the gap is that express immunities tend to "creep." That is, they not only protect the world they were designed to protect, but their shield extends to conduct which the express immunity was not seeking to protect. In other words, the existence of an express immunity providing protection from the antitrust laws for some particular conduct may actually provide immunity for other types of antitrust conduct.[13]

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antitrust. *See* Darren Bush, *Mission Creep, supra* note 2. For examples of state policies creating competition in the context of traditionally regulated industries, *see* United States v. City of Stillwell, Oklahoma, Case No. CIV 96-196 B, government filings available at http://www.usdoj.gov/atr/cases/stilwe0.htm (Oklahoma statute allowed municipal electric cooperatives to compete with one another for new customers); United States v. Rochester Gas & Elec. Corp., 4 F.Supp.2d 172 (W.D. N.Y. 1998)(New York statute allowing retail sales of electricity by cogeneration plants).

Similarly, the *Keogh* doctrine or filed rate doctrine was originally designed to preclude the bypassing of statutory damages granted under the Interstate Commerce Act. The Interstate Commerce Act provided for single damages as a remedy. The plaintiffs in *Keogh* sought to use antitrust to bypass statutorily conferred remedies. This approach was rejected by the Court. The case was not about the justness or reasonableness of rates, as has been increasingly the case with application of the *Keogh* doctrine. Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156, 162-163 (1922).

As has increasingly been the case, *Keogh* has been applied in the context of "regulated deregulation." However, the market clearing prices typically found in such industries bear no relation to the types of rates originally addressed by the *Keogh* progeny, namely, traditional cost of service rates set via tariff after review by an administrative agency. In contrast, market rates are only reviewed (in rare instances) and even then they are reviewed *ex post*. Courts nonetheless continue to hold that the filed rate doctrine applies to market based rates. *See, e.g.*, Public Utility Dist. No. 1 of Grays Harbor County Wash. v. IDACORP Inc., 370 F.3d 641, 651 (9th Cir. 2004)("[W]hile market-based rates may not have historically been the type of rate envisioned by the filed rate doctrine, we conclude that they do not fall outside of the purview of the doctrine."); Public Utility District No. 1 v. Dynegy Power Marketing, Inc., 384 F.3d 756 (9th Cir. 2004); Town of Norwood v. New England Power Co., 202 F.3d 408 (1st Cir. 2000).

[12] Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383 (2007).

[13] See ABA, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 17 (2007)(noting that courts have sometimes adopted "expansive interpretations as to the scope of an exemption")(hereafter ABA Monograph).

The doctrine of primary jurisdiction also may play a crucial role where there is any regulatory oversight at all even in the absence of express or implied immunity.[14] While primary jurisdiction is *not* a methodology by which to grant immunity or exemption, but rather a method by which courts might rely on an agency's expertise in order to resolve a dispute before them, the doctrine has been misused as a grant of immunity in the past.[15]

The doctrine of "primary jurisdiction" is not, as is sometimes thought, an implied immunity. "Primary jurisdiction" addresses the question of whether the antitrust court should *suspend* the resolution of some questions of fact or law over which it possesses antitrust jurisdiction, until passed upon by the regulatory authority whose jurisdiction encompasses the activity involved. Although infrequent, such initial deference can be the practice when (1) resolution of the case involves complex factual inquiries particularly within the province of the regulatory body's expertise; (2) interpretation of administrative rules is required; and (3) interpretation of the regulatory statute involves broad policy determination within the special ken of the regulatory agency. This deference to statutory interpretation extends even to questions of jurisdiction.[16]

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[14] For a discussion of historical misuse of the doctrine, *see* Louis B. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954). *See also* Louis Jaffe, *Primary Jurisdiction Reconsidered*, 102 U. PA. L. REV. 577 (1954); JUDICIAL DOCTRINE OF PRIMARY JURISDICTION AS APPLIED IN ANTITRUST SUITS, STAFF REPORT TO THE ANTITRUST SUBCOMMITTEE OF THE HOUSE COMMITTEE ON THE JUDICIARY, 84TH CONG., 2D SESS. (1956).

[15] Schwartz, *supra* note 11 at 470-471 ("The lesson taught by [the expansion of primary jurisdiction doctrine from a procedural rule to a judicial exemption] is this: if a primary jurisdiction does not already exist, it may be advisable for an industry to create one as a means of avoiding the compulsion to compete which is embodied in the antitrust laws as administered by the federal courts.")

[16] *See Sourthern Railway Co v Combs*, 484 F.2d. 145 (6th Cir. 1973). *See also* Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 934, 938 (8th Cir. 2005)("The contours of primary jurisdiction are not fixed by a precise formula. Rather, the applicability of the doctrine in any given case depends on "whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application. . . .

The effect of judicial reference of a question to an administrative agency should be agency action on the question referred and then further court action in the antitrust case, although agency action might be dispositive. Unlike a finding of express or implied immunity, however, where primary jurisdiction doctrine is applied, the trial court's action is reviewed and that review is on antitrust standards. However, primary jurisdiction is a doctrine that is typically applied at the *discretion* of the court. Thus, statutory language that suggests that a court shall "not be required to defer to the primary jurisdiction of the Surface Transportation Board" does nothing to prevent a court from doing so.

On the other hand, in instances in which the doctrines of express or implied immunity are applied, the agency's action is reviewed on the standards set forth in the regulatory statute, and usually with the judicial deference to the agency's fact finding. As a practical matter, the initial determination of which doctrine applies in a particular case is of great significance in deciding what law applies, the degree to which antitrust considerations may or may not be accorded weight, and whether the antitrust remedies of criminal sanctions or treble damages are available in a particular case. An express or implied exemption finding precludes the application of antirust standards and remedies; while an application of the primary jurisdiction doctrine does not necessarily preclude use of antitrust standards and remedies to adjudicate the dispute but may only defer the adjudication pending an initial decision by the agency.

Among the reasons and purposes served are the promotion of consistency and uniformity within the areas of regulation and the use of agency expertise in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion."(internal quotations and citations omitted).

A court may find none of these doctrines apply in a case involving activity by a regulated industry—even where the agency has some jurisdiction over the activity in question. As Judge Greene pointed out in the AT&T case, in such cases antitrust policy and regulatory policy are seen as compatible and not antagonistic.

I raise these issues to point out that repeal of express antitrust immunity is insufficient to eliminate the potential for judicially created immunities through the doctrines of implied immunity, primary jurisdiction, or limitations of antitrust law's applicability through the filed rate doctrine or other such exemptions.[17] Careful consideration ought to be given to the potential exemptions and immunities that may exist even after repeal of express immunity. Such immunities and exemptions typically are a result of the statutory authority conferred upon the regulatory agency and the execution of that authority by the agency.

[17] See *supra* note 12.

The Railroad Antitrust Immunities

I now turn more specifically to the substance of today's hearing. To discuss the impact of repealing express antitrust immunity upon surface transportation policy, it is necessary to bifurcate my discussion into impacts of repealing the transactional immunity and repealing immunities related to rates.

The Effect of Repeal of Transaction Immunity

A little history is in order to more fully understand how the railroad industry got where it is today. Transactional immunity (immunity for mergers, acquisitions, and related agreements) arose during the 1920s due to increasing concern over the financial health of the railroads and government experience at managing the railroads during World War I.[18] Such experiences led Congress to believe that in order to enhance the financial returns of investors and to promote better service, it was necessary to promote consolidation within the industry with the help of the Interstate Commerce Commission (ICC), the predecessor to the Surface Transportation Board (STB). The ICC adopted a plan that balanced competition against other concerns that were sometimes inconsistent with competition policy.

Congress required that the ICC approve any agreement between railroads, including mergers and acquisitions. Law required that any merger application be in harmony with the policy of consolidating the industry. ICC approval of these transactions immunized the transactions from antitrust scrutiny.

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[18] ABA Monograph, *supra* note 13 at 196. *See also* THEODORE E. KEELER, RAILROADS, FREIGHT, AND PUBLIC POLICY 25 (1983)

There appears to have been little or no Congressional debate about the antitrust immunity at the time of its passage. Courts have thus taken the position of simply accepting the language as it stands without inquiring as to its purpose.[19] The immunity itself has remained virtually unchanged, despite reforms in railroad legislation and the disbanding of the ICC.[20]

Current merger review by the STB, by statutory design and by regulatory obedience to that design, has favored consolidation. The STB is required to determine whether a transaction is in the public interest. While competitive considerations are central to the analysis, they are only one of five factors which the STB is statutorily required to consider.[21] The overall balancing of these factors means that a merger that is grossly anticompetitive should be permitted if the transaction on net yields greater benefits to the stakeholders in the merger (labor, the companies involved, etc.) than are lost by the public.

It is no surprise, therefore, that the STB has only rarely encountered a merger that it did not like.[22] While the STB has imposed conditions upon many mergers, those conditions are not consistently about competitive effects arising from the transaction.

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[19] *See, e.g.,* Denver & Rio Grande W. R.R. Co. v. United States, 387 U.S. 485 (1967); *In Re* REA Express Private Treble Damage Antitrust Litig., 412 F. Supp. 1239, 1261-63 (E.D. Pa. 1976).

[20] *See ICC Termination Act of 1995,* H.R. REP. NO. 104-311, at 83 (1995).

[21] *See* 49 U.S.C. § 11324.

[22] *See* Salvatore Massa, *Injecting Competition in the Railroad Industry Through Access,* 27 TRANSP. L.J. 1, 2 n. 5 (2000). Mr. Massa points out:

> Furthermore, federal policy has favored railroad mergers for quite some time. As Surface Transportation Board Commissioner Gus Owen has observed "[s]ince 1920 it has been the public policy, as enunciated by Congress, to reduce the number of competing railroad systems." See Central Power & Light Co. v. Southern Pac. Transp. Co., Fin. Docket No 31242 at 19 (Surface Transp. Bd. Dec. 27, 1996) (Comm'r Owen commenting) [hereinafter CP&L], aff'd sub. nom., No. 97-1081, 1999 WL 60501 (8th Cir. Feb. 10, 1999). During the period 1956 to 1971, regulatory authorities approved ten of fourteen

It is not at all clear that the move toward consolidation has yielded stability in service and the higher investor returns sought by Congress in the 1920s. Some recent mergers have created service disruptions and spawned shipper complaints.[23] As a result, the STB created a 15 month moratorium on mergers and promulgated a detailed statement concerning its merger review policy that in part created a much higher hurdle for merging parties in demonstrating efficiencies from the transaction. In it, the STB requires that "substantial and demonstrable gains in important public benefit" outweigh any "anticompetitive effects, potential service disruptions, or other merger-related harms."[24] It is unclear what this new standard will yield, if anything, as it has yet to be tested by a major railroad consolidation. And while the STB has declared that it will "consider the policies embodied in the antitrust laws,"[25] it is not clear what weight such policies will be afforded in the overall public interest calculus.

However, mergers are not the only transactional issues that arise in the context of railroads. One major issue is that of "paper barriers."[26] In many sales of secondary trackage to smaller regional players who wished to interconnect with the seller's (a major

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> merger applications. . . . Since 1980, regulatory agencies have approved twelve of thirteen merger applications. See Salvatore Massa, *Are All Railroad Mergers in the Public Interest? An Analysis of the Union Pacific Merger with Southern Pacific*, 24 TRANSP. L.J. 413, 431 n.96 (1997) (listing ten of eleven); CSX Corp.-- Control--Conrail Inc., Fin. Docket No. 33388, 1998 WL 456510 (Surface Transp. Bd. July 23, 1998) (approving the eleventh merger); Rip Watson, *Deal Creates First Large Cross-Border Rail System*, J. COM., Mar. 26, 1999, at A1 (announcing approval of twelfth merger).

Id.

[23] *See* Massa, *supra* note 22 at 12 (detailing service issues arising from the Union Pacific-Southern Pacific merger and the Union Pacific-Chicago & Northwestern Railway merger); Daniel Machalaba, *CSX, Norfolk Southern Find Breaking Up is Hard to Do*, WALL ST. J., June 28, 1999 at B4 (discussing issues with CSX and Norfolk Southern's acquisition and division of Conrail).

[24] 49 C.F.R. § 1180.1(c).

[25] 49 C.F.R. § 1180.1(c)(2).

[26] My former colleague and coauthor Salvatore Massa has excellently described the paper barriers issue. See Salvatore Massa, *A Tale of Two Monopolies Why Removing Paper Barriers Is A Good Idea*, TRANSP. J. Winter/Spring 2001, at 47.

trunk line operator) main lines, the seller, in exchange for interconnection, often demanded that the regional player only interchange its traffic from the divested line to the seller, foreclosing any opportunity for the buyer to interchange with other operators. These "paper barrier" restrains were often permanent.

The ICC historically approved such restraints, finding that they had no anticompetitive effect. And, despite complaints from smaller railroad firms, shippers, and labor organizations, the STB has not changed course with respect to these restraints.[27]

Finally, I should point out that both the ICC and STB could authorize railroad interlocking directorates. Nothing has changed in this realm since the 1920s. The STB's rules establish a procedure for applying for such interlocking directorates, although smaller carriers are exempt from the application process.

To summarize: Under the STB, the railroad industry has been largely consolidated. Only four major domestic carriers existed after 2000, while two Canadian carriers operate subsidiaries in the U.S. that interconnect to their Canadian lines. In this realm of extreme consolidation, it can hardly be said that the railroads' financial stability has improved. It is unclear whether the mergers and the antitrust immunity have indeed improved the health of the merging parties. And the STB has continued to bless what are traditionally anticompetitive agreements without any clear justification for their existence.

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[27] ABA Monograph, *supra* note 13 at 208.

Given this history, I wonder what would be lost if the antitrust laws would be able to come into play in the context of transactions. There appear three identifiable areas in which antitrust law might conflict with railroad regulation by the STB.

First, Section 7 of the Clayton Act does not have a statute of limitations. Thus, any repeal of antitrust immunity should be on a prospective basis only. Otherwise, private plaintiffs may sue to undo mergers long since passed. In most instances, operations have already been consolidated, and unscrambling the eggs would be next to impossible. In this instance alone does it make sense to defer to the prior findings of the STB and only make merger review prospective.[28]

Second, the STB's position on paper barriers runs in contrast to the antitrust laws. There appears to be no justification for these restraints. Under antitrust law rule of reason analysis, permanent barriers associated with the sale of a business which are without a specific and reasonably short duration run afoul of Section 1 of the Sherman Act, and may be subject to Section 2 scrutiny as well. The position of the Sherman Act case law is reasonable here, as no company should have a permanent interest in assets it has sold.[29]

Third, there is no justification for interlocking directorates which run afoul of the antitrust laws yet are approved by the STB. Coordination to the extent necessary to ensure reliability may take place in the railroad industry as it does in other industries, namely through arms length agreements. There is no demonstration that railroads are

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[28] ABA Monograph, *supra* note 13 at 215.
[29] Id. at 216.

uniquely in need of interlocking directorates when compared to other industries such as electricity or natural gas.[30]

To my knowledge, the repeal of the antitrust immunity raises no other transactional concerns.

The Effect of Repeal of Immunity Related to Rates

While deregulation has expanded the application of the antitrust laws in the context of the railroads, there is much room for debate as to the effect of deregulation on the willingness of courts to impose antitrust remedies. For example, the STB continues to have authority over the setting of maximum rates, which could preempt a shipper's monopolization claim for treble damages and force the shipper to seek remedies exclusively before the STB.[31]

In contrast, much has already been opened to antitrust scrutiny. In 1995 Congress repealed the provisions that gave the ICC authority to review and remedy predatory rates, effectively opening such rates to antitrust attack.[32] Congress also deregulated traffic moving between shippers and rail carriers under private contract.[33] The ICC and STB have also moved to exempt many rates or other activities from regulation under the Staggers Rail Act of 1980.[34] The effect of an order from the STB stating that certain conduct is no longer subject to regulation is to open that conduct to antitrust attack.

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[30] Id.
[31] ABA Monograph, *supra* note 13 at 198. *See also supra* note 12 discussing the filed rate doctrine.
[32] *See* 49 U.S.C. § 10701(c); H.R. REP. NO. 104-311, at 82-83 (1995).
[33] *See* 49 U.S.C. §§10709 (c), (g).
[34] *See* Staggers Rail Act § 213, 94 Stat. at 1912-13 (codified at 49 U.S.C. § 10502).

However, because the STB has the option of re-regulating the conduct, courts have appeared reluctant to allow plaintiffs to challenge exempted conduct.[35]

Moreover, while regulators still may immunize rate bureaus from antitrust scrutiny, statutory provisions have curtailed much of the rate bureaus' activities.[36] Other provisions have foisted upon these bureaus other impediments, including substantial reporting requirements. Still, the Department of Justice is on record as being opposed to any antitrust immunity in this realm.[37]

Thus, while regulation has drastically eliminated what is subject to antitrust immunity, several issues arise. If it is the case that much of railroad policy has moved away from regulation to market forces, then it is imperative that antitrust fill the gap left by regulators. Otherwise, we are left with the worst of all possible worlds—a business subject to neither competition policy nor regulation. As one of my coauthors on the ABA Monograph so firmly put it:

> [R]egulatory policies regarding exemptions from regulation are fundamentally troublesome. They allow regulators to effectively walk away from reviewing the competitive effect of certain conduct, but leave uncertainty as to whether the exempted activity remains shield from the reach of antitrust law. If anything, activities exempted from regulation should become subject to antitrust scrutiny even if it is potentially subject to re-regulation by the agency. Finally in this late stage of deregulation, perhaps Congress should no longer delegate authority to the STB to decide what should and should not be regulated in the first place.[38]

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[35] *See, e g*, G. & T. Terminal Packaging Co. v. Consolidated Rail Corp., 830 F. 2d 1230 (3d Cir. 1987).
[36] ABA Monograph, *supra* note 13 at 202.
[37] See H.R. Rep. No. 96-145 at 431 (1979)(statement of Donald L. Flexner, Deputy Assistant Attorney General)("[A]ntitrust immunity is not needed for those rate bureau activities that might benefit the public interest.")
[38] ABA Monograph, *supra* note 13 at 210.

The Effect of Repeal on National Railroad Policy

It could be argued that the imposition of antitrust laws upon the railroad industry would create serious issues with respect to regulatory policy. For example, the potential for a private plaintiff challenge in federal court could expose the defendant to the full panoply of powers possessed by the court under Section 4 of the Sherman Act.[39] The potential for such relief might have ripple effects throughout the national railroad system. In addition to these private civil suit concerns, concern might be expressed about the potential for concurrent jurisdiction in the realm of merger review. I shall address the latter issue first.

As a threshold matter, I am on record that those proposing an immunity should have the burden to demonstrate its need.[40] In the context of today's discussion, I find no reason to conclude that there is something so special in railroad regulation that should isolate it from other industries that exhibit similar issues, including potential natural monopoly conditions in some component of the industry, high coordination needs for purposes of providing service and protecting public safety, and where exists some

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[39] 15 U.S.C. § 4 states in part, "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

[40] *See* Darren Bush, Gregory K. Leonard and Stephen Ross, A FRAMEWORK FOR POLICYMAKERS TO ANALYZE PROPOSED AND EXISTING ANTITRUST IMMUNITIES AND EXEMPTIONS: REPORT PREPARED BY CONSULTANTS TO THE ANTITRUST MODERNIZATION COMMISSION, *available* at http://www.amc.gov/commission_hearings/pdf/IE_Framework_Overview_Report.pdf. *See also* Darren Bush, *Supplemental Written Testimony submitted to the Antitrust Modernization Commission, available* at http://www.amc.gov/commission_hearings/pdf/Bush_Supplemental_Statement.pdf.

modicum of competition. Absent such a showing, there appears little argument against concurrent jurisdiction.

Indeed, the STB argues that the Department of Justice and the STB have only been in disagreement on one particular case in the past. One wonders, then, why the STB would not think that past is prologue.[41]

A more serious argument in favor of concurrent jurisdiction is that because the world of railroads is one of extreme levels of market concentration, the anticompetitive stakes are high. Any future merger could potentially yield strong and persistent anticompetitive effects. The consideration of these effects might be lost in the STB's calculus of total benefits to consumers, the railroads, labor, or other stakeholders to the transaction. The antitrust laws, in contrast, do not necessarily consider transfers from consumers to stakeholders to be a good thing. Moreover, the antitrust agencies more readily consider the full spectrum of competitive harms.

I find it similarly disingenuous to argue that courts will likely cause disruption of national railroad policy in the wake of an antitrust suit brought by a private plaintiff or by a state attorney general as *parens patriae*.[42] Many agencies live with the potential of court action against a company subject to the agency's regulation. As before, unless

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[41] I do not, for purposes of this discussion, however, conclude that any agreement among the agencies related to merger policy is meaningful. The DOJ, in commenting on railroad mergers, is at a distinct disadvantage relative to its knowledge of other mergers. It will not allocate resources to seriously investigate railroad transactions. In the context of mergers in the railroad industry, it will not and cannot engage in the types of investigatory tools typically at its disposal, such as issuance of "second requests", submission of civil investigative demands to third parties (customers and competitors) for documentary materials, conducting of interviews with relevant third parties, conducting of civil investigative demands for oral testimony, and other methods necessary to paint a full and complete picture of the nature of competition in the marketplace.

[42] *See* 15 U.S.C. § 15c.

there is something unique about railroads, there is little justification for granting immunity here while embracing competition policy elsewhere. In most instances, historically such choices between immunity and antitrust law application were not made due to industry idiosyncrasies, but rather due to industry lobbying and political pressure.[43]

Finally, where regulatory action is in place, there are a plethora of potential antitrust exemptions at the defendant's disposal. As mentioned previously, the doctrines of implied immunity and primary jurisdiction might still come into play. And plaintiffs challenging any rates subject to STB authority would likely find that the filed rate doctrine is alive, well, and growing.[44]

For these reasons, there appears to be little justification for the notion that courts handling antitrust litigation will somehow turn national railroad regulatory policy on its head.

Conclusion

The realm of railroad regulation does not generally appear to be at loggerheads with the realm of antitrust laws. Because the STB's role in the railroad industry has waned due to efforts to deregulate the industry, antitrust should step in to fill the void.

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[43] *See generally* ABA Monograph, *supra* note 13. Moreover, courts should be credited for innovative actions that have brought revolutionary changes to regulated industries. As an example, the compulsion of wheeling in *U.S. v. Otter Tail* gave rise to a whole regulatory wave of open access, particularly in but not limited to the electricity industry. See Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). Judge Greene's breakup of AT&T yielded remarkable changes in the telecomm industry as well. United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[44] *See supra* note 12.

The difficulty is that the role the STB plays in the realm of railroads may send mixed signals to courts faced with railroad antitrust cases. Repeal of the express immunity addresses only part of the problem. Issues arise as to the scope of the repeal in a realm where the STB retains some regulatory jurisdiction. And, in a world with expanding judicially created antitrust exemptions, it is worthwhile for us to consider what a potential antitrust plaintiff, who the proposed legislation would purportedly seek to encourage in order to help foster and police competition policy, might gain in a post-express immunity world.

Rather than the dire predictions that the STB might have about such a world, I suggest that the bill might not change much if the courts continue on their current path of embracing broad and bold interpretations of judicially created exemptions such as implied immunity and the filed rate doctrine. On the other hand, I would welcome a full and true repeal of the antitrust immunity here, if carefully done. It is imperative that the gap created via deregulation of the railroads be filled. Where regulation gives way to markets, regulation must also give way to antitrust and competition policy. And where the old policies of regulation such as fostering of consolidation through merger are at odds with more recent policies seeking to foster competition via deregulation, it is the old policies that should yield. Otherwise, we are truly left with the worst of all possible worlds.

Exhibit 41

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Department of Justice, Antitrust Division, 325 7th Street, N.W.; Suite 300 Washington, DC 20530, Plaintiff, v. **ECAST, INC.** 49 Geary Street, Mezzanine San Francisco, CA 94108 and **NSM MUSIC GROUP, LTD.** 3 Stadium Way Elland Road Leeds West Yorkshire United Kingdom LS11 OEW, Defendants.		Civil No.: 1:05CV01754 Judge: Colleen Kollar-Kotelly Filing Date: September 02, 2005

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

On September 2, 2005, the United States filed a civil antitrust Complaint pursuant to Section 4 of the Sherman Act, as amended, 15 U.S.C. § 4, against Ecast, Inc. ("Ecast") and NSM Music Group, Ltd. ("NSM"). The Complaint alleges that defendants entered into a noncompete agreement that caused NSM not to proceed with its plans to enter the U.S. digital jukebox

platform market and compete with Ecast. That agreement, as the Complaint further alleges, is a restraint of interstate trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

The Complaint seeks an order to prohibit defendants from enforcing or adhering to any agreement restraining competition between them, and other equitable relief necessary to prevent a recurrence of the illegal conduct.

The United States filed simultaneously with the Complaint a proposed Final Judgment, which constitutes the parties' settlement. This proposed Final Judgment seeks to prevent defendants' illegal conduct by expressly enjoining them from enforcing or adhering to their existing noncompete agreement, prohibiting them from establishing future noncompete agreements with digital jukebox platform competitors, and requiring each to establish a rigorous antitrust compliance program.

The United States, Ecast, and NSM have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

I. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

A. Defendants

1. *Ecast*

Ecast is a San Francisco-based, privately held company organized under the laws of the State of Delaware. It developed a digital jukebox platform that supplies the software and music

for jukeboxes manufactured by traditional jukebox manufacturers. Ecast refers to jukeboxes that incorporate its platform as "powered by Ecast."

2. *NSM*

NSM is a jukebox manufacturer based in the United Kingdom. It conducts business in the United States through its operating subsidiary, NSM Music, Inc., based outside of Chicago, Illinois.

B. The Digital Jukebox Industry

Digital jukeboxes are Internet-connected devices installed in bars and restaurants that are capable of playing digital music files that are either stored on a hard drive inside each jukebox or are downloaded from a remote server via the Internet. Digital jukeboxes consist of two primary components, a physical jukebox and a "platform," which is the term the industry applies to the combination of the software that powers the jukebox and the licensed collection of music that the jukebox is capable of playing.

As is the case with CD jukeboxes and most other coin-operated devices found in bars and restaurants, digital jukeboxes are purchased, installed, and maintained by 3,000, mostly local businesses called "operators." Operators purchase both CD and digital jukeboxes from distributors, which maintain relationships with jukebox manufacturers.[1/] When operators elect to purchase a digital jukebox, they incur – in addition to the one-time, out-of-pocket payment to the distributor – an obligation to make recurring monthly payments to the platform provider to

[1] Operators then negotiate with bars and restaurants for space in their establishments in which to place the digital jukeboxes.

maintain continuous access to the provider's proprietary software and to the music collection that the platform provider licensed from U.S. copyright holders.

There are roughly 15,000 digital jukeboxes in the United States. The popularity of digital jukeboxes to consumers, and their ability to generate greater revenue for the operator than CD jukeboxes, lead many in the industry to predict the pace of digital jukebox adoption to increase in the coming years.

Digital jukeboxes offer consumers a song selection dramatically larger than CD jukeboxes. Ecast, for example, preloads jukeboxes incorporating its platform with 300 albums, but also permits consumers to access, for a higher price, a licensed collection of 150,000 additional songs that it stores on its remote servers. Ecast-powered jukeboxes also allow consumers to pay to jump to the front of the song queue. Because operators can control the song selection on their digital jukeboxes from a remote location over the Internet, digital jukeboxes also relieve operators of the need to visit each of their jukeboxes to load new releases or holiday favorites.

Ecast released its platform in the United States in 2001. It did so under an agreement with a jukebox manufacturer, which manufactured and distributed (through the manufacturer's established chain of distributors) digital jukeboxes incorporating the Ecast platform. When the manufacturer notified Ecast in 2002 that it intended to terminate their agreement, Ecast immediately sought to avoid an interruption in the delivery of Ecast-powered digital jukeboxes to the U.S. market by finding another manufacturing partner.

C. The Illegal Noncompete Agreement

At a September 2002 industry trade show, NSM displayed a prototype of a digital jukebox and platform that it intended to release in the U.S. market. By that time, NSM was actively negotiating with U.S. copyright holders to obtain the licenses it needed to provide music to consumers through its digital jukebox platform, and had secured a line of credit to pay advances typically demanded by the copyright holders. NSM had also modified the digital jukebox and platform it had previously released in the United Kingdom for release in the United States. It had publicly communicated its intention to enter the U.S. market, and it was internally committed to proceeding with those plans.

Ecast approached NSM at the September 2002 industry trade show and proposed that NSM produce digital jukeboxes which would be powered by Ecast's platform. During subsequent negotiations, Ecast agreed to make a significant upfront payment to NSM, provided that NSM abandon its entry plans in the U.S. and agree not to compete against Ecast. After further negotiations on those terms, Ecast submitted to NSM a letter of intent calling for an upfront payment by Ecast of $700,000, and containing the following noncompete agreement:

> NSM agrees that it will abandon its attempts to acquire music licenses for the U.S. market (the "Territory") and advise all content providers and licensors with which NSM has entered licenses with [sic] that it has abandoned entering the US market with its own digital music platform. NSM also agrees that for as long as Ecast offers the Ecast Platform in the Territory NSM will not produce a competing product in the Territory.

To Ecast, the principal motivation for requesting the noncompete provision was to prevent NSM from entering and disrupting the digital jukebox platform market. NSM went ahead and approved the deal with Ecast that included the above-quoted noncompete provision.

Pursuant to the agreement, NSM thereafter ceased all efforts to enter the U.S. market with its own digital jukebox platform. NSM also fired the two employees responsible for its planned entry. Those employees were the only NSM representatives involved in its copyright license negotiations, its successful efforts to obtain financing necessary to pay advances to copyright holders, and its communications with U.S. operators and distributors concerning NSM's impending U.S. entry.

Ecast recognized that without those employees, NSM no longer possessed the ability to enter quickly with its own platform. Ecast then refused to pay NSM the full $700,000 as agreed. Ecast and NSM subsequently renegotiated the terms of their agreement such that NSM would remain prohibited from entering the U.S. market with its own digital jukebox platform with smaller payments from Ecast. The revised agreement also included a license by NSM to Ecast of a patent concerning digital jukebox technology.

D. Defendants' Noncompete Agreement Is an Unreasonable Restraint of Trade

Noncompete agreements between competitors can violate Section 1 of the Sherman Act. In this case, the noncompete agreement was entered into in conjunction with an agreement to jointly produce and distribute a product. The Department analyzed this noncompete agreement pursuant to the rule of reason because it was reasonably related to the venture and enhanced its efficiency. Under the rule of reason, the Department considers "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). After consideration of the circumstances in this case, the Department concluded that the

noncompete agreement significantly suppressed competition and that harm to competition outweighed the procompetitive benefits of the agreement.

The noncompete agreement between Ecast and NSM forced NSM to abandon its efforts to enter the U.S. market with its own digital jukebox platform. Many operators had expressed great interest in NSM's entry because NSM intended to utilize a more attractive pricing model for its jukebox platform (a flat-price model as opposed to a percentage-of-revenue model) than either Ecast or its only U.S. platform competitor. This and other significant potential benefits to consumers were eliminated by the noncompete provision. The procompetitive benefits of the venture were very limited. Accordingly, the Department concluded that the anticompetitive effects of the noncompete agreement outweighed the procompetitive effects.

II. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The Antitrust Division typically seeks, through an enforcement action, to restore the competitive conditions that existed prior to defendants' establishment of their illegal agreement. The Antitrust Division cannot require NSM to enter the U.S. digital jukebox platform market, but believes it is important to eliminate the artificial impediments to NSM's ability to do so in the future. The proposed Final Judgment thus enjoins defendants from enforcing or adhering to this or any other noncompete agreement that restricts NSM's entry into the U.S. digital jukebox platform market. The proposed Final Judgment also prohibits defendants from establishing noncompete agreements with other digital jukebox platform competitors and imposes a rigorous antitrust compliance program upon each defendant.

III. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in a federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent lawsuit that any private party may bring against the defendants.

IV. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the *Federal Register*. The United States will evaluate and respond to the comments. All comments will be given due consideration by the United States, through the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the *Federal Register*. Written comments should be submitted to:

John Read
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
325 Seventh Street, NW, Suite 300
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

V. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against the defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Ecast and NSM. However, the United States is satisfied that the relief provided in the proposed Final Judgment will prevent a recurrence of conduct that restricted competition in the digital jukebox platform market. Thus, the proposed Final Judgment would achieve substantially all the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VI. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court shall consider:

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief

sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(2) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1). As the United States Court of Appeals for the D.C. Circuit has held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft*, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

"Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). Thus, in conducting this inquiry, "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney).[2/] Rather,

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[2] *See also United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the settlement achieved [was] within the reaches of the public interest"). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-Am. Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. May 17, 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62. Case law requires that

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[3]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether

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the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93rd Cong., 2d Sess. 8-9 (1974), *reprinted* in 1974 U.S.C.C.A.N. 6535, 6538.

[3] *Cf. BNS*, 858 F.2d at 463 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id.* at 1459-60.

VII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: September 2, 2005

Respectfully submitted,

/s/
DAVID C. KULLY (DC Bar # 448763)
JILL A. BEAIRD

Attorneys for the United States
U.S. Department of Justice
Antitrust Division
Litigation III Section
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Exhibit 42

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. ECAST, INC. and NSM MUSIC GROUP, LTD., Defendants	Civil Action No. 05-1754 (CKK)

FINAL JUDGMENT

WHEREAS, the United States of America filed its Complaint on September 2, 2005, alleging that Defendants Ecast, Inc. ("Ecast") and NSM Music Group, Ltd. ("NSM") entered into an agreement in violation of Section 1 of the Sherman Act, and Plaintiff and Defendants, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against, or any admission by, any party regarding any such issue of fact or law;

AND WHEREAS, Ecast and NSM agree to be bound by the provisions of this Final Judgment pending its approval by this Court;

AND WHEREAS, the essence of this Final Judgment is the prevention of future conduct by Ecast and NSM that impairs competition in the digital jukebox platform market;

AND WHEREAS, the United States requires Ecast and NSM to agree to certain procedures and prohibitions for the purpose of preventing the loss of competition;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED, AND

DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Ecast and NSM under Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1.

II. DEFINITIONS

As used in this Final Judgment:

A. "Digital Jukebox" means a commercial vending device that upon payment plays for public performance digital music files that are delivered from a remote server and stored on any internal or connected data storage medium.

B. "Digital Jukebox Platform Competitor" means any natural person, corporate entity, partnership, association, or joint venture that has licensed (or that Ecast or NSM knows or has reason to believe has plans to license) a collection of digital music files from U.S. copyright holders for the purpose of supplying music content in the United States to a Digital Jukebox.

C. "Ecast" means Defendant Ecast, Inc., a privately held company organized and existing under the laws of the State of Delaware, with its principle place in San Francisco, California, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their officers, managers, agents, employees, and directors acting or claiming to act on its behalf.

D. "NSM" means Defendant NSM Music Group, Ltd., a company incorporated under the laws of the United Kingdom, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their officers, managers, agents, employees, and

directors acting or claiming to act on its behalf.

III. APPLICABILITY

This Final Judgment applies to Ecast and NSM, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV. PROHIBITED AND REQUIRED CONDUCT

1. Each defendant, its officers, directors, agents, and employees, acting or claiming to act on its behalf, and successors and all other persons acting or claiming to act on its behalf, are enjoined and restrained from directly or indirectly adhering to or enforcing § 4 ("EXCLUSIVITY") of Defendants' September 2003 "Manufacturing License, Distribution License and Patent License Agreement," or from in any manner, directly or indirectly, entering into, continuing, maintaining, or renewing any contractual provision that prohibits NSM from becoming or limits NSM's ability to become a Digital Jukebox Platform Competitor.

2. Each defendant, its officers, directors, agents, and employees, acting or claiming to act on its behalf, and successors and all other persons acting or claiming to act on its behalf, are enjoined and restrained from, in any manner, directly or indirectly, entering into, continuing, maintaining, or renewing any agreement with any Digital Jukebox Platform Competitor that prohibits such person from supplying or limits the ability of such person to supply music content in the United States to Digital Jukeboxes, provided however, that (a) any merger or acquisition involving either Defendant; (b) any valid license of U.S. Patent No. 5,341,350 from either Defendant to a nonparty; or (c) any valid license of U.S. Patent No. 5,341,350 from NSM to Ecast, which does not in any way prohibit NSM from becoming or limit NSM's ability to become a Digital Jukebox Platform Competitor, will

not be considered, by itself, a violation of this paragraph.

V. COMPLIANCE PROGRAM

1. Each Defendant shall establish and maintain an antitrust compliance program which shall include designating, within thirty (30) days of entry of this Final Judgment, an Antitrust Compliance Officer with responsibility for implementing the antitrust compliance program and achieving full compliance with this Final Judgment and the antitrust laws. The Antitrust Compliance Officer shall, on a continuing basis, be responsible for the following:

a. furnishing a copy of this Final Judgment within thirty (30) days of entry of the Final Judgment to each Defendant's officers, directors, and employees;

b furnishing within thirty (30) days a copy of this Final Judgment to any person who succeeds to a position described in Section V(1)(a);

c. arranging for an annual briefing to each person designated in Section V(1)(a) or (b) on the meaning and requirements of this Final Judgment and the antitrust laws;

d. obtaining from each person designated in Section V(1)(a) or (b) certification that he or she (1) has read and, to the best of his ability, understands and agrees to abide by the terms of this Final Judgment; (2) is not aware of any violation of the Final Judgment that has not been reported to the Antitrust Compliance Officer; and (3) understands that any person's failure to comply with this Final Judgment may result in an enforcement action for civil or criminal contempt of court against each Defendant and/or any other person who violates this Final Judgment;

e. maintaining (1) a record of certifications received pursuant to this Section; (2) a file of all documents related to any alleged violation of this Final Judgment and the antitrust laws; and (3) a record of all communications related to any such violation, which shall identify the date and place of the communication, the persons involved, the subject matter of the communication, and the results of any related investigation;

f. reviewing the content of each e-mail, letter, memorandum, or other communication to any Digital Jukebox Platform Competitor written by or on behalf of an officer or director of either Defendant that relates to the recipient's supply of music content in the United States to Digital Jukeboxes

in order to ensure their adherence to this Final Judgment.

2. If a Defendant's Antitrust Compliance Officer learns of any violations of any of the terms and conditions contained in this Final Judgment, Defendant shall immediately take appropriate action to terminate or modify the activity so as to comply with this Final Judgment.

VI. COMPLIANCE INSPECTION

1. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained or designated thereby, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable written notice to Defendants, be permitted:

a. access during Defendants' office hours to inspect and copy, or at the United States' option, to require Defendants to provide copies of, all books, ledgers, accounts, records, and documents in their possession, custody, or control relating to any matters contained in this Final Judgment; and

b. to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

2. Upon the written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

3. No information or documents obtained by means provided in this Section shall be divulged by Plaintiff to any person other than an authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party

(including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

4. If at the time Defendants furnish information or documents to the United States, they represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then the United States shall use its best efforts to give Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

VII. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further Orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

VIII. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

IX. NOTICE

For the purposes of this Final Judgment, any notice or other communication shall be given to the persons at the addresses set forth below (or such other addresses as they may specify in writing to Ecast or NSM):

John Read
Chief

Litigation III Section
U.S. Department of Justice
Antitrust Division
325 Seventh Street, N W., Suite 300
Washington, D.C. 20530

X. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the Public Interest.

Date: December 16, 2005

Court approved subject to procedures of
Antitrust Procedures and Penalties Act,
15 U.S.C. § 16

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

Exhibit 43

COVINGTON & BURLING LLP

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202 662 6000
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BEIJING
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SAN FRANCISCO
SILICON VALLEY
WASHINGTON

MICHAEL L. ROSENTHAL
TEL 202.662.5448
FAX 202 778 5448
MROSENTHAL @ COV COM

January 28, 2011

BY HAND AND EMAIL

Sandra L. Brown
David E. Benz
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036

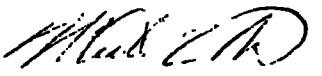
Re: Docket No. 42126, *Union Electric Company D/B/A Ameren Missouri and Missouri Central Railroad Company v. Union Pacific Railroad Company*

Dear Counsel:

Enclosed are Union Pacific's Objections and Responses to Ameren Missouri and MCRR's First Set of Discovery Requests in the above-captioned case.

Please call if you have any questions.

Sincerely,



Michael L. Rosenthal

Enclosures

cc: James A. Sobule (by mail)

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION ELECTRIC COMPANY *D/B/A* AMEREN MISSOURI and MISSOURI CENTRAL RAILROAD COMPANY, Complainants, v. UNION PACIFIC RAILROAD COMPANY, Defendant.	Docket No. 42126
MISSOURI CENTRAL RAILROAD COMPANY – ACQUISITION AND OPERATION EXEMPTION – LINES OF UNION PACIFIC RAILROAD COMPANY and GRC HOLDINGS CORPORATION – ACQUISITION EXEMPTION – LINES OF UNION PACIFIC RAILROAD COMPANY	Finance Docket No. 33508 Finance Docket No. 33537

UNION PACIFIC'S OBJECTIONS AND RESPONSES TO AMEREN MISSOURI'S AND MCRR'S FIRST SET OF DISCOVERY REQUESTS

Union Pacific Railroad Company ("UP") responds to the First Set of Discovery Requests and Requests for Production of Documents, served on January 13, 2011, by Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") and Missouri Central Railroad Company ("MCRR") as follows:

GENERAL RESPONSES

The following General Responses apply to each of Ameren Missouri's and MCRR's interrogatories and requests for production of documents ("discovery requests"):

1. Where UP states that it will produce documents, UP will conduct a reasonable search for responsive, non-privileged documents created prior to November 22, 2010, subject to any other qualifications specified in its response. Responsive documents are being made available, or will as soon as practicable be made available, to counsel for Ameren Missouri and MCRR.

2. Production of information or documents does not necessarily imply that they are relevant to or admissible in this proceeding and is not to be construed as waiving any of the general or specific objections stated herein.

3. In line with past practices in cases of this nature, UP has not secured verifications of the answers to interrogatories herein. UP is prepared to discuss this matter with Ameren Missouri and MCRR if this is of concern with respect to any particular answer.

GENERAL OBJECTIONS

UP makes the following General Objections with respect to all of the discovery requests. Any additional specific objections are stated at the beginning of the response to each request.

1. UP objects to the discovery requests insofar as they seek information or documents subject to the attorney-client privilege, work-product doctrine, or any other applicable privilege or protection. Any production of privileged documents or information is inadvertent and should not be deemed as a waiver of any privilege.

2. UP objects to the discovery requests to the extent they purport to require UP to produce information or documents that are not within its possession, custody, or control. UP objects to Instruction No. 14 on these same grounds.

3. UP objects to the production of documents that constitute or disclose confidential, proprietary, or sensitive nonpublic information. Subject to and without waiving this objection, UP will produce such information, if not otherwise objectionable, designated "Confidential" or "Highly Confidential," subject to the terms of the Protective Order in this case. UP reserves the right to seek additional protection as needed.

4. UP objects to the discovery requests to the extent they would require UP to disclose proprietary internal costing information.

5. UP objects on the grounds of burden and relevance to producing any documents or information from prior to 1995 (and UP also objects on the grounds of burden and relevance in certain specific responses to producing documents or information from prior to 2008). Any production by UP of information or documents from earlier periods shall not be considered a waiver of this objection.

6. UP objects to the extent that the requests seek information or documents "to the present." Where complainants seek information or documents "to the present" and UP agrees to provide responsive documents or information, UP will only search for and provide information up to November 22, 2010, unless UP otherwise indicates in its response. Any production by UP of information or documents from later periods shall not be considered a waiver of this objection.

7. UP objects to the demand that copies of any responsive documents be delivered to the offices of Ameren Missouri and MCRR's counsel in that it seeks to impose obligations on UP beyond those in the Board's rules. *See* 49 C.F.R. § 1114.30.

8. UP objects to the demand that all responsive information and documents be produced within 15 days of January 13, 2011. UP will produce its documents on a rolling basis.

9. UP objects to production of documents prepared in connection with, or information relating to, possible settlement of this or any proceeding.

10. UP objects to the discovery requests to the extent that they call for the preparation of compilations, documents, summaries, analyses, or other special studies of any sort not already in existence, and UP by its responses does not, unless otherwise noted, undertake to prepare or produce any special studies. Any production by UP of information or documents in this category shall not be considered a waiver of this objection.

11. UP objects on the grounds of burden to the extent that discovery requests seek the production of "all documents" regarding an evidentiary point when the information necessary for complainants' evidentiary submissions could be obtained through a request for documents "sufficient to show" that evidentiary point.

12. UP objects to Instruction No. 1 as unduly burdensome and to the extent that this Instruction seeks to impose obligations on UP beyond those in the Board's rules. *See* 49 C.F.R. § 1114.29.

13. UP objects to Instructions Nos. 6 and 13 as unduly burdensome, and to the extent that they purport to require UP to produce detailed information concerning documents about which UP no longer has records or knowledge.

14. UP objects to Instructions Nos. 7, 18, and 19 as duplicative, inconsistent, and contradictory. UP will produce documents in a reasonable manner and will confer with complainants if they have questions about the documents.

15. UP objects to Instruction No. 18 as unduly burdensome, and as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence to the extent it purports to require UP to produce the entire contents of files containing responsive documents and to identify all files containing responsive documents by file name and number.

16. UP objects to the definition of "communications" as unduly burdensome and vague in that it includes an "exchange of . . . thoughts."

17. UP objects to the definitions of "UP," "GRC," "BNSF," "SP," "SSW," and "MP" as overbroad and unduly burdensome and vague to the extent that the definitions of these corporations include "anyone acting on its behalf."

18. UP objects to the definition of "relating to," "related to," "in relation to," and "regarding" as overbroad and unduly vague insofar is it encompasses information and documents that bear "indirectly" on the matter discussed.

19. UP expressly reserves the right to supplement these responses.

20. UP hereby incorporates each and every General Objection in its specific objections and responses below.

INTERROGATORIES

Interrogatory No. 1

Please describe UP's use of the STL Trackage Rights Segment from Jan. 1, 2000 to the present.

UP Response:

UP objects to this interrogatory on the grounds that it is unduly burdensome, is vague, and is overbroad in that it seeks information regarding UP's "use" of the STL Trackage Rights Segment over more than a decade.

Subject to and without waiving its objections, UP refers complainants to UP's Response to Requests for Production No. 2.

Interrogatory No. 2

Please provide a list of all former or current UP (including MP) or SP (including SSW) employees, officers, contractors, or consultants, or any other persons known to you, who participated in or have any knowledge regarding

(1) SP coal service to Labadie on the former Rock Island Line (the existence of which UP admitted in ¶ 16 of its Answer);
(2) the Settlement Agreement between UP and BNSF (the existence of which UP admitted in ¶ 17 of its Answer);
(3) the applicability of the Settlement Agreement to Labadie;
(4) UP's sale of a portion of the former Rock Island Line to GRC Holdings (such sale was admitted by UP in ¶ 22 of its Answer);
(5) the Trackage Rights Agreement between UP and MCRR (such agreement was admitted by UP in ¶ 22 of its Answer);
(6) UP's consideration of or exploration of selling the Former Rock Island Line before the completion of the UP-SP merger;
(7) the Interchange Agreement mentioned in ¶ 24 of UP's Answer;
(8) the press release issued by UP and mentioned in ¶ 27 of UP's Answer;
(9) valuation (including but not limited to the net liquidated value), offer price, or sale price of all or any portion of the Former Rock Island Line at any time;
(10) consideration of abandonment of any portion of the Former Rock Island Line at any time; and
(11) any rail infrastructure constructed or contemplated to allow BNSF trackage rights on UP to be used for access to Labadie (including but not limited to the crossover described at footnote 11 of the Complaint).

For each such person, please provide the name, current employer, current title, current address, employer at the time of the person's participation in or acquisition of knowledge about the relevant event, and title at the time of the person's participation in or acquisition of knowledge about the relevant event. For each such person, please also specify what event(s) he or she participated in or has knowledge of, as designated above.

UP Response:

UP objects to this interrogatory on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this interrogatory on the grounds that it is vague and unintelligible in that it seeks information regarding persons who "*participated in* . . . coal service . . ., the applicability of the Settlement Agreement . . ., the press release . . ., etc." (emphasis added). Responding to this interrogatory, as written, would require UP to identify, and provide the names, current employers, current address, and past employment information regarding, literally hundreds, and perhaps thousands, of former and present UP "employees, officers, contractors, consultants," not to mention "any other persons known to [UP]" that might have "any knowledge" regarding events spanning several decades, the vast majority of whom would have no knowledge or information relevant to the issues in this proceeding.

Subject to and without waiving its objections, UP states that it is willing to meet with complainants to discuss ways in which this request could be narrowed and clarified, and then to attempt to identify a reasonable number of current or former employees that may have knowledge that is relevant to the issues in this proceeding.

Interrogatory No. 3

Please provide all facts and justifications which support the denial, in ¶ 14 of your Answer, of the statement that UP purchased the MP line in 1984.

UP Response:

UP objects to this interrogatory on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it asks UP to provide "all" facts related to its denial of

complainants' allegation that UP purchased an MP line in 1984, and on the grounds that the request for "justifications which support" UP's denial of the allegation is unintelligible.

Subject to and without waiving its objections, UP states that its control of MP was approved in 1982, *see Union Pacific Corporation, Pacific Rail System, Inc. and Union Pacific Railroad Company – Control – Missouri Pacific Corporation and Missouri Pacific Railroad Company*, 366 I.C.C. 459 (1982), and that Union Pacific Corporation acquired MP by stock exchange on December 22, 1982.

Interrogatory No. 4

Does UP deny that a contract currently exists between Ameren Missouri and UP for deliveries of coal from the PRB to Labadie, as seems to be the implication of ¶ 21 of the UP Answer? If so, then please provide all facts and justifications which support such denial. Regardless of whether UP denies the current existence of a contract, please explain UP's use of the term "arrangement" in ¶ 21.

UP Response:

UP objects to this interrogatory on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it asks UP to provide "all" facts related to its denial that it is providing coal deliveries to Labadie pursuant to a "contract," and on the grounds that the request for "justifications which support" UP's denial is unintelligible.

Subject to and without waiving its objections, UP states that it does not deny the existence of an agreement with Ameren Missouri for delivery of SPRB coal to Labadie and that it used the term "arrangement" because the terms of the agreement have not been documented in the form that UP typically uses for 49 U.S.C. § 10709 transportation contracts. *See also* Union Pacific Railroad Company – Petition for Declaratory Order, STB Finance Docket No. 35021 (served May 16, 2007).

Interrogatory No. 5

Please provide all facts and justifications which support the "explor[ation]" by UP of selling a portion of the Former Rock Island Line, as stated in ¶ 22 of the UP Answer.

UP Response:

UP objects to this interrogatory on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it asks UP to provide "all" facts relating to an event or series of events, and on the grounds that the request for "justifications which support the explor[ation]" is unintelligible.

Subject to and without waiving its objections, UP refers complainants to the description of UP's offer to sell a portion of the Former Rock Island line to BNSF as part of the settlement in the UP/SP merger that is contained in Union Pacific Railroad Company's Response to AmerenUE's Petition for Clarification and Enforcement of Merger Conditions (UP/SP-374), Finance Docket No. 32760 (Feb. 8, 2000).

Interrogatory No. 6

Please provide all facts and justifications which support the "related[ness]" of the trackage rights agreement to the Line Sale Contract, as stated in ¶ 22 of the UP Answer.

UP Response:

UP objects to this interrogatory on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it asks UP to provide "all" facts relating to the relationship of two documents, and on the grounds that the requests for "justifications which support the related[ness]" of two documents is unintelligible.

Subject to and without waiving its objections, UP refers complainants to the documents themselves, MCRR's Notice of Exemption in *Missouri Central Railroad Company –*

Exemption – Acquisition from GRC Holdings Corporation and Operation of Rail Line Between St. Louis and Kansas City, MO., STB Finance Docket No. 33508 (Dec. 23, 1997) at 2 (referring to the acquisition of "incidental trackage rights" over UP), and the Board's decisions in *Missouri Central Railroad Company – Acquisition and Operation Exemption – Lines of Union Pacific Railroad Company*, STB Docket No. 33508, (served Apr. 30, 1998), slip op. at 1; (served Nov. 30, 1998), slip op. at 1; and (served Sept. 14, 1999), slip op. at 1 (referring to the acquisition of "incidental trackage rights" over UP).

Interrogatory No. 7

Please provide all facts and justifications which support the assertion, in ¶ 24 of the UP Answer, that the two Interchange Agreements provided with the Complaint "are not copies of the final versions."

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it asks UP to provide "all" facts relating to whether two documents are final versions of those documents, and on the grounds that the request for "justifications which support the assertion" about those documents is unintelligible.

Subject to and without waiving its objections, UP refers complainants to UP's Response to Request for Production No. 22.

Interrogatory No. 8

Please provide all facts and justifications which support the statement, in ¶ 32 of the UP Answer, "UP denies the remaining allegations in Paragraph 32." In particular, provide all facts and justifications which support denial of the statements "MCRR's tracks directly connect to Labadie" and "the line had been used to deliver coal to Labadie prior to the date of the Line Sale Contract."

UP Response:

UP objects to the interrogatory on the grounds that it is unduly burdensome and overbroad in that it asks UP to provide "all" facts relating to its denial of allegations contained in the Complaint, and on the grounds that the request for "justifications which support the statement" that UP denies certain allegations is unintelligible.

Subject to and without waiving its objections, UP states that this interrogatory incorrectly implies that UP denied certain statements by mischaracterizing the allegations that are actually contained in Paragraph 32 of the Complaint. Paragraph 32 of the Complaint was a confused combination of statements and supporting clauses. UP's Answer admitted that there was a Trackage Rights Agreement that was related to the Line Sale Contract but denied that the documents constitute a "paper barrier." With regard to the statements that complainants now suggest in Interrogatory No. 8 were intended to constitute allegations that required a response, UP refers complainants to Paragraph 16 of its Answer, in which UP states, "UP admits that SP provided rail transportation of coal to Labadie on the former Rock Island line. . . ." UP further states that the current status of MCRR's tracks is an issue that is covered by UP's pending discovery requests to complainants.

Interrogatory No. 9

Please provide what is, in UP's view, the proper "characterization" of the offer made by UP, as described in ¶ 58 of the Complaint and ¶ 58 of the UP Answer. Please provide all facts and justifications which support UP's characterization.

UP Response:

UP objects to this interrogatory on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it asks UP to provide "all" facts relating to the terms under which UP offered to give MCRR access to Labadie, and on the grounds that the request for

"justifications that support UP's characterization" is unintelligible and that the request for UP to provide "the proper 'characterization'" is vague. UP further objects to this interrogatory on the grounds that it is an inappropriate subject for an interrogatory and it is premature in that UP will address complainants' legal arguments in its Reply Evidence.

Subject to and without waiving its objections, UP refers complainants to the discussion of UP's efforts to resolve issues related to access to Labadie that is contained in Union Pacific Railroad Company's Response to AmerenUE's Petition for Clarification and Enforcement of Merger Conditions (UP/SP-374), Finance Docket No. 32760 (Feb. 8, 2000).

Interrogatory No. 10

Please provide all facts and justifications which support UP's denial of the statement in ¶ 61 of the Complaint.

UP Response:

UP objects to this interrogatory on the grounds that it is unduly burdensome and overbroad in that it asks UP to provide "all" facts relating to its denial of a legal argument in the Complaint, and on the grounds that the request for "justifications which support UP's denial" is unintelligible. UP further objects to this interrogatory on the grounds that it is an inappropriate subject for an interrogatory and it is premature in that UP will address complainants' legal arguments in its Reply Evidence.

Interrogatory No. 11

Please provide all facts and justifications which support UP's denial, in ¶ 68 of the UP Answer, of the statement that voiding the paper barrier will have a negligible impact on UP's lawful operations. Please describe all impacts on UP's lawful operations from voiding the paper barrier.

UP Response:

UP objects to this interrogatory on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the

discovery of admissible evidence in that it asks UP to provide "all" facts relating to UP's refusal to accept the complainants' characterization of the restriction on MCRR service to Labadie or of the impact of a hypothetical future event, and on the grounds that the request for "justifications that support UP's denial" is unintelligible. UP further objects to this interrogatory to the extent it implies that there is a "paper barrier" affecting Labadie and that UP is engaged in anything other than lawful operations. UP additionally objects to this interrogatory on the grounds that it is premature to ask UP to describe "all impacts" of an undefined, hypothetical event and that responding to this request would require UP to undertake a burdensome special study.

Subject to and without waiving its objections, UP states that it denies that any ruling that voided the terms under which it agreed to transfer lines and/or allow trackage rights over lines and consequently required UP to provide uncompensated access, or access for less compensation than might have been negotiated but for those terms, could properly be characterized as having a "negligible impact" on UP's operations.

Interrogatory No. 12:

Please provide all facts and justifications which support UP's denial, in ¶ 69 of the UP Answer, of the statement that eliminating the paper barrier would not alter UP's opportunity to earn revenue. Please describe all ways which elimination of the paper barrier would alter UP's opportunity to earn revenue.

UP Response:

UP objects to this interrogatory on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it asks UP to provide "all" facts relating to UP's refusal to accept complainants' characterization of the impact of a hypothetical future event, and on the grounds that the request for "justifications which support UP's denial" is unintelligible. UP further objects to this interrogatory to the extent it implies that there is a "paper barrier" affecting

Labadie. UP further objects to this interrogatory on the grounds that it is premature to ask UP to describe "all ways" in which its opportunity to earn revenue might possibly be affected by a hypothetical event.

Subject to and without waiving its objections, UP states that its opportunity to earn revenue might be altered if Ameren Missouri were to enter into an arrangement to move coal to Labadie using a carrier other than UP.

Interrogatory No. 13:

Please provide all facts and justifications which support UP's denial of ¶ 91 of the Complaint. Does UP contend that MCRR does not have the physical ability to deliver coal to Labadie?

UP Response:

UP objects to this interrogatory on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it asks UP to provide "all" facts relating to UP's denial that UP and MCRR are "direct competitors because they both have the physical ability to deliver coal to Labadie on separate rail lines," and on the grounds that the request for "justifications which support UP's denial" is unintelligible. UP further objects to this interrogatory as premature in that MCRR's physical ability to deliver coal to Labadie is a subject of UP's pending discovery requests to complainants.

Subject to and without waiving its objections, UP states that complainants are subject to contractual restrictions that prevent MCRR from delivering coal to Labadie using the Former Rock Island Line or the UP lines over which MCRR has trackage rights, and MCRR currently has no other lines that serve Labadie, and in that sense, UP and MCRR are not and never have been "direct competitors," contrary to the allegations in Paragraph 91 of the Complaint.

Interrogatory No. 14:

Please provide all facts and justifications which support UP's defense #5. Please include a citation to the "applicable statute of limitations" that UP mentions in defense #5.

UP Response:

UP objects to this interrogatory on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it asks UP to provide "all" facts relating to one of UP's defenses, and on the grounds that the request for "justifications which support" UP's defense is unintelligible. UP further objects that this is an inappropriate subject for an interrogatory, and that the interrogatory is premature in that the issue is a subject of UP's pending discovery requests to complainants and that UP will address its legal arguments in its Reply Evidence.

Subject to and without waiving its objections, UP refers complainants to the allegations in Paragraph 31 of the Complaint that "[a]lthough Ameren Missouri knew of the restrictions prohibiting service to Labadie in the Line Sale Agreement, . . . Ameren Missouri believed that the only course of action available was to finance the purchase of the line under GRC's terms and subsequently challenge the . . . restriction . . . at a later date."

Interrogatory No. 15:

Please provide all facts and justifications which support UP's defense #6.

UP Response:

UP objects to this interrogatory on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it asks UP to provide "all" facts relating to one of UP's defenses, and on the grounds that the request for "justifications which support" UP's defense is unintelligible. UP further objects that this is an inappropriate subject for an interrogatory, and

that the interrogatory is premature in that the issue is a subject of UP's pending discovery requests to complainants and that UP will address its legal arguments in its Reply Evidence.

Subject to and without waiving its objections, UP refers complainants to the allegations in Paragraph 31 of the Complaint that "[a]lthough Ameren Missouri knew of the restrictions prohibiting service to Labadie in the Line Sale Agreement, . . . Ameren Missouri believed that the only course of action available was to finance the purchase of the line under GRC's terms and subsequently challenge the . . . restriction . . . at a later date."

Interrogatory No. 16:

Please provide all facts and justifications which support UP's defense #7.

UP Response:

UP objects to this interrogatory on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it asks UP to provide "all" facts relating to one of UP's defenses, and on the grounds that the request for "justifications which support" UP's defense is unintelligible. UP further objects that this is an inappropriate subject for an interrogatory, and that the interrogatory is premature in that the issue is a subject of UP's pending discovery requests to complainants and that UP will address its legal arguments in its Reply Evidence.

Subject to and without waiving its objections, UP refers complainants to the allegations in Paragraph 31 of the Complaint that "[a]lthough Ameren Missouri knew of the restrictions prohibiting service to Labadie in the Line Sale Agreement, . . . Ameren Missouri believed that the only course of action available was to finance the purchase of the line under GRC's terms and subsequently challenge the . . . restriction . . . at a later date."

Interrogatory No. 17:

Describe UP's incentive for moving Illinois Basin coal to Labadie.

UP Response:

UP objects to this interrogatory on the grounds that it is overbroad, is vague in that the term "incentive" is not defined, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objection, UP states that if Ameren Missouri chooses to use Illinois coal at Labadie, UP has an incentive to move Illinois coal in order to generate contribution to its fixed costs and earn profits.

Interrogatory No. 18:

Identify all requests received by UP from Ameren or Ameren affiliates for transportation of Illinois Basin coal to Labadie or other facilities in Missouri or Illinois.

UP Response:

UP objects to this interrogatory on the grounds that it is overbroad and unduly burdensome in that it asks UP to identify requests dating back to 1995, and is unduly burdensome in that Ameren Missouri should be aware of its own requests for transportation of Illinois Basin coal to Labadie or other facilities.

Subject to and without waiving its objections, UP states that Ameren Missouri or an Ameren affiliate recently asked UP to quote rates for transportation of Illinois Basin coal to the Coffeen plant in Coffeen, Illinois, and that UP previously quoted rates and provided transportation for Illinois Basin coal moving to the Duck Creek plant, near Peoria, Illinois.

Interrogatory No. 19:

Identify all improvements necessary to permit loaded coal trains to be handled on the STL Trackage Rights Segment, including interchange at Rock Island Junction.

UP Response:

UP objects to this interrogatory on the grounds that it is vague in that it does not identify the type of "improvements" at issue or identify the operating characteristics of any

hypothetical "loaded coal trains," seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and seeks information that would require a burdensome special study.

Interrogatory No. 20:

Identify all persons with knowledge of, or who participated in any way in any analysis or decision regarding, UP retaining ownership of the STL Trackage Rights Segment while selling the Vigus to Pleasant Hill segment.

UP Response:

UP objects to this interrogatory on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it asks UP to identify "all" persons "with knowledge of" or "who participated in any way in" past and ongoing events. UP notes that complainants' request would appear to require UP to identify potentially hundreds of people who have "knowledge" of UP's continued ownership of the STL Trackage Rights Segment.

Subject to and without waiving its objections, UP states that John H. Rebensdorf was the individual at UP who was principally responsible for negotiating the terms of the Line Sale Agreement.

Interrogatory No. 21:

Describe UP's reason for retaining ownership of the STL Trackage Rights Segment while selling the Vigus to Pleasant Hill segment.

UP Response:

UP objects to this interrogatory on the grounds that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objections, UP states that it retained ownership of the STL Trackage Rights Segment in order to serve customers on the line and ensure that the line would not be used by another carrier to move loaded coal trains to Labadie.

Interrogatory No. 22:

Please identify, by name, title, and address, the person(s) who provided each answer to these Interrogatories and who reviewed and selected documents to produce in response to the Requests for Production.

UP Response:

UP objects to this interrogatory on the grounds that it is unduly burdensome and impinges on the attorney-client privilege and the attorney work-product doctrine. UP also objects to this interrogatory as premature in that UP has not completed its production of documents in response to the Requests for Production.

REQUESTS FOR PRODUCTION

Request for Production No. 1:

Please produce documents, computer files, and other information showing or related to UP's use of the STL Trackage Rights Segment since Jan. 1, 1997, including at least the following information:

(a) number of revenue cars carried by year
(b) commodities carried by volume or tonnage per year (STCC code)
(c) revenue (from transportation and any other use, including leases, licenses, easements, and other revenue-generating activities) attributable to the STL Trackage Rights Segment by year.

UP Response:

UP objects to this request on the grounds that it is vague in that it asks UP to produce unspecified "documents, computer files, and other information" "showing" or "relating" to UP's "use" of the STL Trackage Rights Segment, and is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery

of admissible evidence in that it seeks an apparently limitless scope of information regarding UP's "use" dating back to 1997.

Subject to and without waiving its objections, UP refers complainants to UP's Response to Request for Production No. 2.

Also subject to and without waiving its objections, UP states specifically in response to sub-part (c) that it will produce information sufficient to show revenue obtained from Central Midland Railway Company that is attributable to Central Midland Railway Company's use of the STL Trackage Rights Segment to provide rail transportation services for the period from 2008 through 2010.

Request for Production No. 2

Please produce documents, computer files, and other information showing the information listed below for each UP train using the STL Trackage Rights Segment since Jan. 1, 2007, including as much as possible of the following information:

a. net tons per train
b. origin city and state
c. destination city and state
d. net tonnage of commodity(ies) per train (by STCC code)
e. originating carrier if not UP
f. destination carrier if not UP
g. any other carriers participating in movement, if not yet disclosed
h. total loaded movement miles
i. total loaded miles on UP
j. UP revenue for the movement (or share of revenue if joint-line movement)
k. car ownership (private, UP, or other railroad)
l. contract, pricing authority, or tariff identification number
m. car type code

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and seeks information that would require a burdensome

special study. UP also objects to this request on the grounds that the term "UP train" is vague and undefined.

Subject to and without waiving its objections, UP states that it will provide information of the type requested in as many of the categories as are reasonably available by car, for traffic that originated or terminated on the STL Trackage Rights Segment and subsequently moved in UP's account for the period from 2008 through 2010. UP states that it cannot provide the information requested in sub-parts (a) and (d) but will provide information regarding net tons per car. UP also states that it cannot provide the information requested in sub-part (h) and that, if the movement was originated or terminated by a handling carrier rather than a line-haul carrier, it may not have fully accurate information with regard to sub-parts (e) and (f).

Request for Production No. 3

Please produce documents showing or related to use by railroads other than UP of the STL Trackage Rights Segment since Jan. 1, 2000. Include responses to as many of the subparts of Request for Production 2 as possible.

UP Response:

UP objects to this request on the grounds that it is vague in that it asks UP to produce unspecified "documents" "showing" or "relating" to the "use" by railroads other than UP of the STL Trackage Rights Segment, and is unduly burdensome, is overbroad, seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it seeks an apparently limitless scope of information regarding non-UP-railroads' "use" dating back to 2000, and seeks information that would require a burdensome special study.

Subject to and without waiving its objections, UP states that it will produce copies of traffic certifications, salvage reports, and documents sufficient to show payments UP has received for use of the STL Trackage Rights Segment by Central Midland Railway Company.

UP states that it does not have information of the type requested in the subparts of Request for Production No. 2 that would show use of the STL Trackage Rights Segment by railroads other than UP.

Request for Production No. 4

Please produce all licenses, easements (including but not limited to fiber optics and utility easements), storage agreements, leases, interchange agreements, trackage agreements, contracts, and/or any other documents evidencing any understanding or agreement related to use of the STL Trackage Rights Segment or the underlying right-of-way by any party, including but not limited to the Central Midland Railway Company, other than UP. For each such use, produce documents which also show the revenue obtained by UP from such use.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information of a type and for a time period that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objections, UP states that it will produce copies of any current agreements with Central Midland Railway Company, and UP also refers complainants to its Response related to part (c) of Request for Production No. 1.

Request for Production No. 5

Please produce all invoices, authorities for expenditure, bills, and other documents related to all maintenance work by UP or any other party on the STL Trackage Rights Segment since Jan. 1, 1997. The documents produced should provide sufficient information to describe the location (milepost number) of the work, the type of work, the total cost of the work, whether any other party has contributed or will contribute to the cost, and the amount paid to date by UP.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objections, UP states that it will produce copies of salvage reports related to the STL Trackage Rights Segment that it has received from Central Midland Railway Company.

Request for Production No. 6

Please produce all invoices, authorities for expenditure, bills, and other documents related to all capital investment work by UP or any other party on the STL Trackage Rights Segment since Jan. 1, 1997. The documents produced should provide sufficient information to describe the location (milepost number) of the work, the type of work, the total cost of the work, whether any other party has contributed or will contribute to the cost, and the amount paid to date by UP.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objections, UP states that it will produce copies of salvage reports related to the STL Trackage Rights Segment that it has received from Central Midland Railway Company.

Request for Production No. 7

Please produce all studies, evaluations, tunnel evaluation reports, bridge condition reports, culvert condition reports, assessments, and other documents related to the physical condition of the real estate, track, track assets, and other physical assets of the Former Rock Island Line from Jan. 1, 1990 to the present.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objections, UP notes that, as complainants allege in the Complaint, MCRR has owned "the majority" of the Former Rock Island Line since

1999 (Paragraph 6) and has been a wholly owned subsidiary of Ameren Development Company since 2001 (Paragraph 30).

Request for Production No. 8

Please produce all strategies, projections, studies, reports, memoranda, plans, and any other documents related to UP's past use, current use, or future use of the Former Rock Island Line from Jan. 1, 1990 to the present. Please include in your production all strategies, forecasts, projections, studies, reports, memoranda, plans, and any other documents related to current or future generation of revenue from the Former Rock Island Line.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objections, UP notes that, as complainants allege in the Complaint, MCRR has owned "the majority" of the Former Rock Island Line since 1999 (Paragraph 6) and has been a wholly owned subsidiary of Ameren Development Company since 2001 (Paragraph 30).

Also subject to and without waiving its objections, UP states that it will produce any studies, analyses, or reports regarding the value of the portion of the Former Rock Island Line that was the subject of the Line Sale Contract or the lease of the STL Trackage Rights Segment to Central Midland Railway Company and that were prepared in connection with the actual or contemplated sale or lease of all or portions of that trackage.

Request for Production No. 9

Please produce all documents describing or related to (including maps or diagrams which show) any land ownership, access, easement rights, licenses, or other property rights held by UP in the STL Trackage Rights Segment.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waving its objections, UP refers complainants to its Response to Request for Production No. 15.

Request for Production No. 10

Please produce all documents related to the value of UP's or SP's ownership and property interest(s) in the STL Trackage Rights Segment, including but not limited to appraisals, land valuations, fair market value assessments, net liquidated value assessments, surveys, studies, analyses, reports, and evaluations from Jan. 1, 1990 to the present. Include in your production the value of the physical assets (track, other track materials, ties, structures, etc.), as well as the value of the real property.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objections, UP states that it will produce any studies, analyses, or reports regarding the value of the STL Trackage Rights Segment and that were prepared in connection with the lease of that trackage to the Central Midland Railway Company. UP also refers complainants to its Response to Request for Production No. 15.

Request for Production No. 11

Please produce all documents related to the value of all or any portion of UP's ownership or property interest(s) (or the ownership or property interest(s) of UP's predecessors-in-interest, such as SP) in the Former Rock Island Line from Jan. 1, 1980 to the present, including but not limited to appraisals, land valuations, fair market value assessments, net liquidated value assessments, surveys, studies, analyses, reports, and evaluations. Include in your production the value of the physical assets (track, other track materials, ties, structures, etc.), as well as the value of the real property.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objections, UP states that it will produce any studies, analyses, or reports regarding the value of the portion of the Former Rock Island Line that was the subject of the Line Sale Contract or the lease of the STL Trackage Rights Segment to Central Midland Railway Company and that were prepared in connection with the actual or contemplated sale or lease of all or portions of that trackage. UP also refers complainants to its Response to Request for Production No. 15.

Request for Production No. 12

Please produce all documents related to any sale, contemplated sale, lease, contemplated lease, or other disposition (whether consummated or contemplated) of any interest in the Former Rock Island Line to any party, whether or not such sale, lease, or disposition eventually occurred. Please include in your response all communications, offers, agreements, bids, analyses, and related documents from Jan. 1, 1990 to the present.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objections, UP states that it will produce any studies, analyses, or reports regarding any sale or contemplated sale of the portion of the Former Rock Island Line that was the subject of the Line Sale Contract or the lease of the STL Trackage Rights Segment to Central Midland Railway Company and that were prepared in connection with the actual or contemplated sale or lease of all or portions of that trackage. UP also refers complainants to its Response to Request for Production No. 4.

Request for Production No. 13

Please produce all communications, agreements, analyses, and other documents related to actual or potential BNSF rail service to Labadie.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, particularly to the extent that the request is not limited to documents relating to Illinois Basin coal.

Subject to and without waiving its objections, UP states that it will produce a copy of its settlement agreement with BNSF in connection with the UP/SP merger. UP also refers complainants to the discussion of UP's efforts to resolve issues related to access to Labadie that is contained in Union Pacific Railroad Company's Response to AmerenUE's Petition for Clarification and Enforcement of Merger Conditions (UP/SP-374), Finance Docket No. 32760 (Feb. 8, 2000).

Request for Production No. 14

Please produce all communications, agreements, analyses, and other documents related to actual or contemplated sales, leases, licenses, or other disposition of any interest in any part of the Former Rock Island Line to GRC, GRC Holdings, MCRR, BNSF, or any other railroad or party.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objections, UP states that it will produce any studies, analyses, or reports regarding any sale or contemplated sale of the portion of the Former Rock Island Line that was the subject of the Line Sale Contract or the lease of the STL Trackage

Rights Segment to Central Midland Railway Company and that were prepared in connection with the actual or contemplated sale or lease of all or portions of that trackage.

Request for Production No. 15

Please produce track charts, profiles, operating timetables, station lists, and land valuation maps for the Former Rock Island Line.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objections, UP states that it will produce a copy of any current track charts, profiles, operating timetables, station lists, and land valuation maps for the STL Trackage Rights Segment. UP notes that, as complainants allege in the Complaint, MCRR has owned "the majority" of the Former Rock Island Line since 1999 (Paragraph 6) and has been a wholly owned subsidiary of Ameren Development Company since 2001 (Paragraph 30).

Request for Production No. 16

Please produce bridge lists and culvert lists for the Former Rock Island Line.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objections, UP notes that, as complainants allege in the Complaint, MCRR has owned "the majority" of the Former Rock Island Line since

1999 (Paragraph 6) and has been a wholly owned subsidiary of Ameren Development Company since 2001 (Paragraph 30).

Request for Production No. 17

Please produce all plans, strategies, forecasts, studies, analyses, and documents related to transportation (whether by UP or some other transportation provider) of coal mined in the Illinois Basin (including all coal mined in Illinois, Indiana, and Western Kentucky). Please provide all plans, strategies, studies, analyses, and documents related to PRB transportation that addresses PRB versus Illinois inter-basin competition, including analyses of the profitability of PRB and Illinois coal moves.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Request for Production No. 18

Please produce documents related to UP's decision-making when setting transportation rates to its customers when those customers can transport or receive products via two or more rail routes on UP of differing length. Please include in your response those situations where a UP customer has both long-haul and short-haul options on UP. Please provide all documents including rates quoted for customers in these situations.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Request for Production No. 19

Please produce all documents related to the revenue per ton-mile received by UP from Powder River Basin coal traffic and Illinois Basin coal traffic.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Request for Production No. 20

Please produce all documents relating to requests by customers to move coal in single-line hauls from Illinois origins, and all documents relating to requests by customers to move coal from UP Illinois origins via multi-line haul.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Request for Production No. 21

Please produce all filings or other documents provided to the Securities and Exchange Commission or other federal or state governmental entities that mention, describe, or allude to the sale of the Former Rock Island Line described in STB Docket Nos. 33508 and 33537.

UP Response:

UP objects to this request on the grounds that it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objections, UP states that the requested information appears to be information that would be available in publicly filed documents.

Request for Production No. 22

Please provide the final versions of the two Interchange Agreements described in ¶ 24 of the UP Answer.

UP Response:

UP will produce responsive documents.

Request for Production No. 23

Please produce records sufficient to describe all SP coal deliveries to Labadie.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, especially because the request is not limited to records regarding Illinois Basin coal.

Subject to and without waiving its objections, UP states that the requested information should be within Ameren Missouri's possession.

Request for Production No. 24

Please produce documents, analyses, and other records showing any changes in transportation revenue received by UP for transportation of PRB coal since Jan. 1, 2000. Documents produced should sufficiently show the fuel surcharge portion of any transportation revenue.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Request for Production No. 25

Please produce all documents related to UP's offer to provide Labadie access to MCRR, as described in the STB decision served Dec. 15, 2000 (slip op. at 19) in STB Docket No. 32760 (Sub-No. 21), Decision No. 16.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome and is overbroad in that it seeks "all" documents, as well as documents that are publicly available.

Subject to and without waiving its objections, UP states that it will produce responsive documents.

Request for Production No. 26

Please produce all documents related to any maintenance or capital investment work by Ameren Missouri, MCRR, their affiliates, or contractors (or funds contributed by Ameren Missouri, MCRR, or their affiliates) for changes to UP or BNSF infrastructure to facilitate service to Labadie.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, especially because Ameren Missouri should have information related to work by or funds contributed by Ameren Missouri and its affiliates, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objections, UP notes that complainants allege in Paragraph 16 of the Complaint that Ameren Missouri "invested in the former Rock Island line . . . in the form of infrastructure improvements"; UP assumes that complainants have information sufficient to support their allegation.

Request for Production No. 27

Please produce all documents related to SP's proposed abandonment, as described in ¶ 17 of the Complaint.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving its objection, UP states that it will produce copies of documents filed by SP in that proceeding to the extent they can be located in a reasonable search.

Request for Production No. 28

Please produce all documents related to the potential or actual impact of the UP/SP Merger and/or the Settlement Agreement on UP rail service to Labadie, including but not limited to the financial effect on UP's rail service to Labadie.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, especially because the request is not limited to documents relating to the potential or actual impact on rail service involving Illinois Basin coal. UP further objects to this request on the grounds that the request for documents related to the "impact," including the "financial effect on UP's rail service" is vague and ambiguous.

Request for Production No. 29

Please produce all documents which support, relate to, or contradict the denials in UP's Answer.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request because it reflects an improper attempt to intrude upon the attorney work-product doctrine.

Request for Production No. 30

Please produce all documents which support, relate to, or contradict defenses on which UP relies in this proceeding.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and is premature in that UP is conducting discovery related to its defenses. UP further objects to this request because it reflects an improper attempt to intrude upon the attorney-client privilege and attorney work-product doctrine.

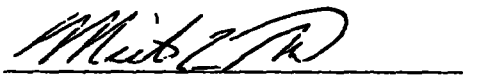
Request for Production No. 31

Please produce all documents relied upon, reviewed, or consulted when preparing the response(s) to any of the Interrogatories or Requests for Production contained herein.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP further objects to this request because it reflects an improper attempt to intrude upon the attorney-client privilege and attorney work-product doctrine.

Respectfully submitted,



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January 28, 2011

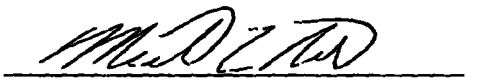
CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, hereby certify that on this 28th day of January, 2011, I caused a copy of Union Pacific's Objections and Responses to Ameren Missouri and MCRR's First Set of Discovery Requests to be served by hand and email on:

Sandra L. Brown
David E. Benz
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036

and by U.S. first-class mail, postage prepaid, on:

James A. Sobule
Ameren Corporation
1901 Chouteau Avenue
St. Louis, MO 63103



Michael L. Rosenthal

REDACTED
Exhibits 44-46